In The
Supreme Court of the United States

The State of South Carolina,

Petitioner,

vs.

Donney S. Council, a/k/a
Donnie S. Council,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court of South Carolina

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CAPITAL CASE
QUESTIONS PRESENTED

I.

Whether the Supreme Court of South Carolina abandoned the *Strickland*[1] prejudice test in favor of a mere "influence" test in direct contravention of this Court's precedent, *Strickland v. Washington*.

II.

Whether the Supreme Court of South Carolina abandoned the *Strickland* prejudice test by improperly shifting the constitutional burden to the State to show harmless error which is patent error under this Court's precedent, *Brecht v. Abrahamson*.[2]

III.

Whether the Supreme Court of South Carolina abandoned the *Strickland* test as a whole and improperly applied a "nothing to lose" standard to determine error and prejudice in direct convention of this Court's precedent, *Strickland v. Washington*, and *Knowles v. Mirzayance*.[3]

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[1] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

[2] *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993).

[3] *Knowles v. Mirzayance*, 2009 WL 746274, 7 (U.S. 2009).

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INTRODUCTION TO THE PETITION

Petitioner, the State of South Carolina, through the Attorney General of South Carolina, hereby petitions the Court for a Writ of Certiorari to review the decision of the Supreme Court of South Carolina which affirmed a grant of a new capital sentencing proceeding by way of collateral review. The Supreme Court of South Carolina concluded relief was warranted as trial counsel rendered deficient representation in the investigation and presentation of mitigation evidence in the instant case. Petitioner asserts the state court misapplied *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), in its evaluation of error and prejudice. .

CITATION TO OPINION BELOW

The December 29, 2008 re-filed decision of the Supreme Court of South Carolina affirming the grant of state post-conviction relief is attached to the Petition as **Appendix A**. The opinion has been published as *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008). The original opinion, filed September 8, 2008, is attached to the Petitioner as **Appendix B**. For the convenience of the reader, Petitioner will refer to the attached copy of the opinion when referencing the state court's opinion.

JURISDICTION

The Supreme Court of South Carolina entered its original opinion on September 8, 2008. Petitioner filed a Petition for Rehearing on September 23, 2008. The Supreme Court of South Carolina denied the petition within the re-filed opinion issued December 29, 2008. Pursuant to Rule 13, Rules of the Supreme Court of the

United States, this petition has been timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

This matter involves the Sixth Amendment to the United States Constitution which provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

Respondent is presently under a death sentence. Respondent was found guilty, after a trial by jury of murder; kidnapping; administering poison; grand larceny of a vehicle; burglary; larceny; and two (2) counts of criminal sexual conduct in the first degree. After the sentencing phase, the jury found the existence of the following statutory aggravating circumstances: (1) murder was committed while in the commission of criminal sexual conduct in any degree; (2) murder was committed while in the commission of kidnapping; (3) murder was committed while in the commission of burglary in any degree; (4) murder was committed while in the commission of a larceny with the use of a deadly weapon; (5) murder was committed while in the commission of killing by poison; and (6) murder was committed while in the commission of physical torture. (App. p. 2608). The Supreme Court of South Carolina affirmed the convictions and death sentence on direct appeal. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). This Court denied Respondent's petition from review from his direct appeal. Respondent thereafter

pursued a collateral action in post-conviction relief ("PCR"). The PCR judge vacated the death sentence and ordered a new sentencing proceeding, on Respondent's allegation that counsel was ineffective, by "failing to obtain a mitigation investigator or to otherwise adequately prepare and present powerful mitigation evidence." (App. pp. 5493-5517). Petitioner, the State, appealed the grant of relief, arguing the PCR judge erred in finding error and prejudice sufficient to support relief:

> The PCR judge erred in finding counsel was ineffective in failing to investigate and present mitigation evidence. Counsel made significant investigation into Council's social and mental health history. Simply, upon consultation with his retained forensic psychiatrist, and with his client, and upon review of the available guilt, innocence, and mitigation evidence, counsel made an informed strategic decision to present limited mitigation through Council's mother, and rely on an emphasized and consistent law-based bar to the death sentence

(Petition for Writ of Certiorari, Argument I).

The Supreme Court of South Carolina affirmed the PCR judge's grant of relief on this issue, finding that even though the evidence adduced in the collateral proceeding "may not have risen to the level of 'abuse, neglect, and predator and prey situations found in other cases,' as the State contends, it nevertheless may have swayed the jury as in Wiggins." (Appendix A, p. 18).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Supreme Court of South Carolina abandoned the *Strickland* standard, and committed gross error under this Court's precedent in three distinct ways. The state court, though identifying the correct "reasonable probability" test for prejudice, actually applied a mere "influence test," through the misuse of *Wiggins'* [4] "influence" language. Second, the state court clearly improperly shifted the burden of proof to the State to show harmless error. Third, the state court adopted a "nothing to lose" standard for evaluating constitutional error. The correct stand for evaluating ineffective assistance claims remains *Strickland v. Washington* error and prejudice.

The Supreme Court of South Carolina abandoned the Strickland prejudice test in favor of a mere "influence" test in direct contravention of this Court's precedent, Strickland v. Washington

Misuse of Wiggins Language

Wiggins did not change the *Strickland* standard; rather, *Wiggins* embraced and applied the *Strickland* standard. *See Wiggins v. Smith*, 539 U.S. at 534, 123 S.Ct. 2527 ("In *Strickland*, we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). Specifically, in reviewing

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[4] *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003).

sentencing phase issues in capital cases, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. *Stickland* remains the standard for reviewing virtually all ineffective assistance of counsel claims. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495 (2000) (stating that "the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims").

The state court here, however, extracted and misused the phrase "might well have influenced the jury's appraisal of [Respondent's] culpability" assessment," in *Wiggins*, 539 U.S. at 538, 123 S.Ct. 2527, which is not incorrect when taken in context[5], to unburden the applicant of his required showing of a reasonable probability that the result would have been different in order to receive relief. (Appendix A, p. 21). *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). In doing so, the Supreme Court of South Carolina abandoned the constitutional test, and allowed relief in the instant case. The misuse is evident in the plain wording of the erroneous opinion. The analysis veered into "*may have influenced* the jury's assessment," (Appendix A, p. 21),

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[5] Before the quoted sentence, the Court noted "As the Federal District Court found, the mitigating evidence in this case is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence." *Wiggins*, 539 U.S. at 538, 123 S.Ct. at 2544.

and could not discount that the collateral action evidence, had it been heard at sentencing, may have "*influenced* at least one juror," (Appendix A, p. 24, n.7). The majority clearly relied on an erroneous standard. Moreover, the weighty finding of not one circumstance in aggravation qualifying the conviction for a death sentence[6], not two circumstances in aggravation, but *six* aggravating circumstances, was only mentioned in sterile recognition. (Appendix A, p. 21). The *six* aggravating circumstances found are:

> (1) murder was committed while in the commission of criminal sexual conduct;
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> (2) murder was committed while in the commission of kidnapping;
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> (3) murder was committed while in the commission of burglary;
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> (4) murder was committed while in the commission of a larceny with the use of a deadly weapon;
>
> (5) murder was committed while in the commission of killing by poison; and
>
> (6) murder was committed while in the commission of physical torture.

State v. Council, 335 S.C. 1, n. 1 6, 515 S.E.2d 508, 510 n.1 (1999).

Further, and only by footnote, did the majority even reference (briefly) the "brutality" of the crime.

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[6] Under state law, there need be only one to qualify for a death sentence: "... if *a* statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment." S.C. Code Ann. § 16-3-20 (B)(emphasis added).

(Appendix A, p. 24, n. 7).[7] The state supreme court, on direct appeal, described the crime as follows:

> Late Thursday afternoon, October 8, 1992, Evelyn Helminiak visited with her neighbor Elizabeth Gatti, a seventy-two year old widow. Mrs. Gatti was preparing dinner when Mrs. Helminiak arrived. The next day, another neighbor, Charles Fields, became concerned about Mrs. Gatti because her morning newspaper was still in the driveway and her car was gone. Mr. Fields testified Mrs. Gatti was a creature of habit who retrieved her newspaper every morning at 4:30 a.m., read the paper, and threw it over to Mr. Fields' driveway by 8:00 a.m. so he could read it. When the newspaper was still in the driveway and the car was still gone on Friday evening, Mr. Fields called emergency services.
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> When the authorities entered Mrs. Gatti's house, perishable food items were found on the kitchen counter. Several of the

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[7] The majority also referenced "overwhelming evidence of guilt" found in the direct appeal. (App. pp. 17). In yet another example of the majority's misinterpretation of this Court's precedent, the majority often confuses overwhelming evidence of guilt from the guilt phase with a forgone conclusion of a finding of actual or major participation in the murder. *See Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676 (1987)(to received a death sentenced, the jury must find major participation and reckless indifference to human life to impose death on one who did not actually commit the crime). This additional misinterpretation is addressed more fully *infra*.

> rooms in Mrs. Gatti's house had been ransacked. Mrs. Gatti's body was discovered underneath a bedspread in her basement. She had been hogtied with a white cord and layers of duct tape were wrapped around her entire head. Her clothes had been ripped, and the crotch of her underwear had been cut out. Surrounding her body were various bottles of cleaning fluids. Mrs. Gatti had been sexually assaulted.
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> Dr. Nichols, the pathologist who performed the autopsy on Mrs. Gatti, testified her body was covered with numerous lacerations and bruises, and someone had attempted to manually strangle her. Further, a gaping laceration extending from her vagina into the rectal area indicated penetration by a very stiff foreign object. Dr. Nichols testified the cause of death was asphyxiation due to mechanical suffocation as a result of the duct tape, and contributory to the cause of death was the ingestion and aspiration of cleaning fluids and the binding ligatures on the wrists. Dr. Nichols testified the aspiration indicated Mrs. Gatti was forced to drink the cleaning fluids. According to Dr. Nichols, Mrs. Gatti lived 2-4 hours after the vaginal/rectal injury occurred.

State v. Council, 335 S.C. at 7, 515 S.E.2d at 511.

The majority, even while acknowledging the lesser value of the collateral action evidence in this case as

compared to that elicited in *Wiggins*, in evaluating the case in light of the above referenced improper (and clearly less difficult to meet) standard, concluded:

> Although this mitigating evidence may not have risen to the level of "abuse, neglect, and predator prey situations found in other cases," as the State contends, *it nevertheless may have swayed the jury* as in Wiggins.

(App. p.18)(emphasis added).

In other words, the state supreme court's evaluation was premised upon mere speculation of an undetermined "influence" on the sentencing process, which prevented fair evaluation of the evidence by abandonment of the correct "reasonable probability" prejudice test.[8] Respondent does not suggest that all evidence must be as "powerful" as that demonstrated in *Wiggins*, rather, that the mitigation evidence elicited in collateral proceedings must be considered in light of the evidence of record and in terms of the correct burden of proof - a reasonable probability that the sentencer may have returned a life sentence. *Strickland*.

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[8] Even in the opinion from the appeal from collateral proceedings, the state court still references that counsel should have been on notice that further investigation "*could* potentially yield powerful mitigating evidence." (Appendix A, p. 16)(emphasis added). If the evidence adduced in collateral proceedings does not yet constitute "powerful mitigating evidence," as conceded by the majority, (Appendix A, p. 21), one wonders when a convicted defendant is not entitled to a presumption that more evidence may be found in yet another proceeding.

The state court's opinion is a gross misapplication of this Court's *Strickland* precedent. Moreover, the state court clearly applied yet another wrong standard - - the harmless error standard.

The Supreme Court of South Carolina abandoned the Strickland prejudice test by improperly shifting the constitutional burden to the State to show harmless error which is patent error under this Court's precedent, Brecht v. Abrahamson

The state supreme court acknowledged but rejected consideration of the overwhelming evidence of heinous nature of the crime and the multiple aggravating circumstances, finding instead that the State had not shown the error was harmless. This is a test specifically not applicable to a *Strickland* claim. *Brecht v. Abrahamson*, 507 U.S. 619, 629-630, 113 S.Ct. 1710, 1717 (1993). In footnote 7 of the first opinion, subsequently withdrawn, the majority incorrectly, but clearly, made a harmless error analysis part of their consideration:

> In no way should our decision be construed as minimizing the brutality of the victim's murder. We are, nevertheless, bound by a standard of review which mandates our affirmance of the PCR judge's decision if there is any probative evidence to support it. Moreover, *we are cognizant of appellate decisions in this state which determined that counsel's deficient performance in a death penalty case did not warrant reversal where, beyond a reasonable doubt, the error did not contribute to the verdict. See Plath v. Moore,* 130 F.3d 595, 601-02 (4th Cir.1997) (finding

> trial counsel's alleged failure to present additional mitigating evidence in sentencing phase of capital trial did not warrant habeas relief for petitioner; stating "in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor"); *Arnold v. State/Plath v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (finding, in capital case, trial counsel's failure to object to unconstitutional malice charge was harmless where, beyond a reasonable doubt, the error did not contribute to the verdict in light of the overwhelming evidence of malice). *We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence for Respondent. Thus, we are unable to find trial counsel's deficient performance constituted harmless error.*

(Appendix B, p. 60, n. 7)(emphasis added).

Strickland prejudice is based on reasonable probability defined as "a probability sufficient to undermine confidence in the outcome" of the trial, or in this case, the sentence, *Strickland*, 466 U.S. at 694-695. The burden is on the applicant. *Id. See also Williams*, 529 U.S. at 294, 120 S.Ct. 1495; *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456 (2005)(applying *Strickland* error and prejudice, noting the burden was on the petitioner to show prejudice). Moreover, the reviewing court reweighs the whole of the evidence in determining whether there is a "reasonable probability" that the

sentence would have given a life sentence. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. Harmless error is not applicable in this setting. *Brecht*. Yet, the State's petition for rehearing was denied. (Appendix A, p. 2). According to the state court, no reconsideration of the logic and reasoning, as would normally warrant the grant of rehearing, was made. Rule 221(a), *South Carolina Appellate Court Rules* ("A petition for rehearing... shall state with particularity the points supposed to have been overlooked or misapprehended by the Court."). *See also* Am.Jur. Appellate § 824 ("Generally, because rehearing is a method of correcting a significant flaw in the original proceeding, a rehearing will normally not be granted unless the court's earlier decision was manifestly erroneous); 5 C.J.S. Appeal and Error § 690 ("As a general rule... material alterations in the original judgment must ordinarily be reserved for the rehearing proper and cannot be allowed on the hearing of the petition."). Moreover, though the original opinion was withdrawn, it is evident that only the phrasing of footnote seven was reworked, in essence, the extraction of "reasonable doubt" and the substitution of "prejudice." This is merely additional proof the flawed analysis, intact and unchanged, remains. The majority even continued to cite the exact same precedent that relied on a harmless error analysis on collateral review of a trial court error. i.e. a *Chapman*[9] harmless error analysis. (See App. p. 19). In fact, the state court deleted references to "reasonable doubt" and substituted "prejudice." In other words, the state court used the wrong standard to decide the case, and merely substituted correct words when

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[9] *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967)(considering whether trial error was harmless beyond a reasonable doubt).

error was pointed out. The incorrect analysis, however, remained.

The constitutional standard places the burden upon the defendant to prove a reasonable probability that the sentence would be life. The state supreme court's erroneous analysis inverted the burden in contravention of the proper federal constitutional standard under *Stickland*, *Wiggins*, and *Rompilla*.

The Supreme Court of South Carolina abandoned the Strickland test as a whole and improperly applied a "nothing to lose" standard to determine error and prejudice in direct convention of this Court's precedent, Strickland v. Washington, and Knowles v. Mirzayance

A "Nothing to Lose" Standard is Contrary to Strickland and Unfairly Skews Evaluation of Counsel Strategy

The majority applied a "nothing to lose" standard in evaluation of the claim. (Appendix, p. 20). As this Court has most recently written, "[t]his Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims." *Knowles v. Mirzayance*, 2009 WL 746274, 7 (U.S. 2009). Simply, the state court (again) applied the wrong standard. Moreover, with the improper "nothing to lose" standard as a crutch, the majority entered into dissection of a valid strategy favoring a *post hoc* determination that the strategy was not ultimately successful.

For instance, the majority reasoned that, by sentencing, defense "counsel was already aware the jury had rejected the defense theory that Respondent was not

the actual perpetrator but was merely present." (Appendix 19). This conclusion reflects that the majority ignored a *Tison v. Arizona* based legal bar to imposition of the death penalty in an attempt to pigeonhole the theory into one of residual doubt. This was not a residual doubt theory. This is a case were the client admitted one part of the crime in another part of the victim's home, a sexual assault in a bedroom that was supported by DNA evidence found in that room that was consistent with the defendant's DNA, and the murder scene, in another part of the home, yielded a DNA sample that was not consistent with the defendant. Under hand of one, hand of all, the defendant could be guilty of the home invasion and all crimes therein, but, to be sentenced to death, the jury had to find, in addition, major participation and reckless indifference to human life to impose death on one who did not actually commit the crime. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987). The majority totally discounted this distinction made and authorized by United States Supreme Court precedent.

Further, the state supreme court then essentially concluded that it is never reasonable not to present whatever scrap of mitigation evidence may be found.[10]

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[10] In yet another error in the majority opinion, the majority found: "Clearly, trial counsel could have argued to the jury that even if Respondent was the actual perpetrator he suffered from these mental deficiencies and mental illness at the time of the crime." (Appendix A, p. 20). There was no mental illness diagnosis revealed relating to the crime or the time of the crime. The clinical psychologist hired in the collateral action testified that "in all probability" there were "some issues" at the time of crime. (App. p. 4078, lines 11- p. 4079, line 1). The forensic psychiatrist hired in the collateral action, when asked about the diagnosis of a delusional disorder approximately six weeks after Respondent's death sentence was imposed, the doctor

Defense counsel's strategy to depend almost exclusively on this "legal bar to the death penalty" concept, though perhaps bold, was not founded on a dereliction of duty to investigate, or a misunderstanding of the law.[11] He

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opined:

> It's very significant for a number of reasons. Number one, psychoses usually won't develop quite that quickly. You have to go back in time. We even - - we do kind of have the luxury in psychiatry of hindsight. You can go back oftentimes and reconstruct some idea of the onset of illness, and it's very seldom that someone will present that acutely psychotic *unless it's their first break which it could be.*

(App. p. 4195, lines 7-19)(emphasis added).

In trial preparation, however, defense counsel relied on a forensic psychiatrist who had aided in the preparation of two other capital trials. Defense counsel asked the doctor to "make sure this man was competent and that he didn't have any significant mental illness." (App. p. 5285, line 23- p. 5286, line1). The doctor ultimately discovered "no really diagnosable mental illnesses." (App. p. 5286, lines 5-13).

[11] Moreover, the consist reference to a co-defendant yield some success, as defense counsel noted in testimony in the collateral proceedings:

> ... I thought it's consistent with him saying he was there. What does it - - how does it help you make the decision? And then I moved that away, leaving the only thing that was - - that was - - that the State had not offered that was consistent with that being the D.N.A. evidence of the sample that was left on the sheet on the lady. And I don't - - obviously you can judge effectiveness by results. They didn't believe that, but that was where I was

headed.

> You can believe everything the State says except he didn't commit the offense. He was there and, of course, there's liability by association and by the fact that he allegedly conspired with him and they had a common understanding and all of that sort of thing. But even in closing I kept making reference to the co-defendant, and *the State made reference to the co-defendant and there wasn't a co-defendant that was indicted....*

(App. p. 4327, line 22 - p. 4328, line 12)(emphasis added). Moreover, the stance was consistent with the direction of the client, (App. p. 4283 and 4316), and the client's remarks to the jury. Respondent addressed the jury in the guilt phase and admitted his presence at the victim's home during the crime, but flatly denied participation in the murder. He admitted selling drugs, and even that he occasionally used marijuana, but insisted that he used nothing stronger. He maintained that a drug buyer led him to the victim's home. (App. pp. 2288-93). In closing, counsel echoed the theme, and reminded the jury that the semen found on tissue in victim's bedroom was not specifically identified as Respondent's and that the semen on the material found next to the body in the basement definitely was not Respondent's. (App. pp. 2310-11). During the penalty phase Respondent again denied guilt. (App. p. 2570, lines 8-15). Defense counsel argued, in part:

> ... I don't know what your decision was with regard to Mr. Council's specific participation, or what his specific mental intent was when he actually entered into the dwelling. I don't know that and I can't ask you that. You had the right to return a verdict based upon different views of the facts. I can't ask you what your views were.
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> But I can tell you something else that the judge is going to charge you. This is the most important piece of the law that you will hear. The death penalty cannot be imposed who aids and abets

simply chose to focus the jury's attention on this clear legal principle. Further, he selected, from a range of witnesses, (PCR App. pp. 4453-54), the witness he considered most sympathetic and best choice, the defendant's mother, to place a personal touch on the mitigation case. This strategic choice was not a result of counsel's omission or error, but a well-reasoned strategy chosen by qualified, experienced counsel. Defense counsel testified that he was aware that he could offer mitigation evidence, but testified the lack of illness, but real possibility of negative character evidence, would not aid in the "not the trigger man" strategy. (PCR App. p. 4302, lines 1-19). In fact, the social worker's testimony concerning the environment driving Petitioner to crime and violence is indicative of the double-edged sword often associated with this type of testimony - he was destined to become the killer he became, (App. p. 4145, lines 2-6), thus inherently dangerous. *See generally Wiggins*, 539 U.S. at 535(acknowledging cases where "double edge" evidence was justifiably shunned). Further, counsel considered but rejected the presentation of additional evidence[12] of drug use in that he considered such evidence would not be helpful. (App. p. 4326; p. 4435; p. 4456).

> in a crime in the course in which a murder is committed by others, but who did not, himself, kill, attempt to kill or intend to kill, or intend that a killing take place, or that lethal force be used. You've got to make that decision.

(App. p. 2574, line 19 - p. 2575, line 10).

[12] In addition to the State's evidence of a prior record, Respondent admitted occasional marijuana use to the jury. (App. pp. 2288-2293).

See Clisby v. Alabama, 26 F.3d 1054 (11th Cir. 1994)("Precedents show that many lawyers justifiably fear introducing evidence of alcohol and drug use"); *Rogers v. Zant*, 13 F.3d 384, 388 (11th Cir. 1994)(reasonable for counsel to conclude that drug use would have "drawn attention away from other kinds of evidence and argument that the lawyers thought might be better received."). Defense counsel did offer the mother's testimony as some evidence of mitigation based on his evaluation of there being a number of females on the jury that may have related to Ms. Council's testimony. (App. pp. 4323-24). Defense counsel also testified that he had other witnesses that may have been able to present background or character mitigation evidence, but ultimately determined the individuals could not or would not help - - either claiming illness, or just refusing to give any helpful testimony. (App. pp. 4453-54). *See Laws v. Armontrout*, 863 F.2d 1377, 1391 (8th Cir. 1988)("counsel could have reasonably determined that calling Laws' relatives to the stand, after what they had told him of their feelings for Laws, would have been destructive to Laws' defense.").

It is clear that counsel carefully crafted his argument to appeal to the jury he was facing. In fact, defense counsel testified that he additionally chose to present religious arguments against imposition of the death penalty given the specific juror information he received on the actual seated jurors on "church affiliation" and indications that his jurors were "people of faith" who may respond well to such argument. (App. p. 4437, lines 20-25). This again demonstrates the careful, thoughtful, and thorough presentation of evidence and argument in the penalty phase.

In short, counsel was fully aware of Respondent's family situation - - the disadvantages, criminal background, school disabilities, and drug use - - and he considered presentation of this evidence against the available position of reliance on a legal based bar to imposition of the death penalty, and decided that consistency would present the most forceful argument. This strategic choice was made with the consent of his client, and largely based on the information concerning the crime as supplied by his client. *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."). Such position is best shown in the following passage from the PCR hearing:

> Q. ... based upon the jury instructions that had been given, you would not have been aware as to whether they found him culpable as being the actual perpetrator or assisting in that perpetration. Isn't that correct?
>
> A. They weren't required to make that determination in their verdict.
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> Q. Okay, yet did you realize that there was a risk that they had already made that determination?
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> A. Certainly.
>
> Q. And with that potential that that determination had already been

made, did you understand or did you recognize that other than the mother's emotional testimony that they would be left without virtually much, if any, understanding of his background?

A. Well, you were in a situation where what I depended upon was that he was not the actual participant. Obviously they returned a verdict which could have meant that they believed he was or he wasn't; I didn't know. And in closing that was what I argued in my closing on the sentencing.

Q. Okay. Did you think that - - that in some manner the problems with the education background, some dysfunction within the family would hurt your client if it was presented rather than help him?

A. No, I can't honestly say that. I don't think the educational situation would have hurt him. It was still - - I wanted to be consistent. If I'm saying that he did not perpetrate the crime, then some of those issues would have been irrelevant. The point I wanted to make was that: Go after the triggerman. Don't go after him.

Q. Okay. And you wanted to narrow the jury's focus on that point and not

minimize that argument in light of the presentation in this other case?

A. Yes.

Q. So it was basically an all-or-nothing approach then, wasn't it?

A. Yes.

Q. Did your client understand it is going to be that type of approach in his discussion with you?

A. Yes. Our focus consistently was that he didn't do it, that Frank Douglas did.

(App. p. 4463, line 21 - p. 4465, line 12).

That was a sound exercise of strategy.

It becomes apparent, though, in reviewing the record, and clearly from review of the state court opinion, that this case is not truly about a challenge to quality of investigation; rather, this case squarely poses the question whether counsel can ever be allowed to choose not to present any and all evidence in mitigation no matter what his opinion on the quality or impact of the evidence on the jury or his preferred strategy. (See App. p. 15, "Even if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence."; See also App. p. 16, " ... given the State had already presented damaging character evidence, we do not believe Respondent's character could have been damaged any further... Trial counsel essentially would have had 'nothing to lose'"). Even *Wiggins*, the case so relied upon by the state supreme court and Respondent, does not require presentation of any or all evidence.

Wiggins, 539 U.S. at 522-523, 123 S.Ct. 2527 ("our principal concern in deciding whether Schlaich and Nethercott exercised 'reasonable professional judgmen [t],' is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable.*")(internal citation omitted). Even so, in regard to the investigation, the quality of the investigation in this matter completely distinguishes this case from that in *Wiggins*. There is no like circumstance. The majority's opinion clearly does not follow federal precedent and the majority has improperly allowed relief.

Proper Prejudice Test Demonstrates Petitioner is Not Entitled to Relief

The majority clearly did not agree with the counsel's strategy to present limited mitigation evidence.[13] The dissent resolved the issue on the absence

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[13] For example, the majority apparently found error in counsel's failure to immediately investigate when the case was assigned, even though the collateral proceedings revealed numerous hours of detailed research, investigation, and preparation (Appendix A, p. 16); found fault with defense counsel's decision to hire a private investigator and also rely on his law partner to collect background information instead of a certified "social history investigator," finding, inexplicable, that neither was "qualified... to evaluate the information to assess Respondent's background" (leaving undefined this "assessing" background theory), again ignoring the detailed research, investigation, and preparation made (Appendix A, p. 17); and also found fault in failing to obtain and review "family records" (App. pp. 17-18). Petitioner again submits, as it did below, that several of the entries on the documents admitted in the state collateral proceedings post-date the sentencing on October 23, 1996, and should not have been considered in regard to assessing information available to counsel before the 1996 trial. (App. p.

of prejudice, but only by using the incorrect standards as listed above. The dissent was correct that Petitioner failed to carry his burden of proving prejudice.

Again, it is proper to return to *Strickland*. To be entitled to relief the party seek relief "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result in the proceeding would have been different. A reasonable probability is a probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. In regard to sentencing, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069. This Court has presumed that evaluation is made in the stance of a reasonable sentencing actor. *Id.* at 695, 104 S.Ct. at 2068 ("[T]he idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency[,] .... are irrelevant to the prejudice inquiry."). Review is also made based on the whole of the

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5408). Moreover, the pre-trial records included extended family members medical records, and living conditions of family members not even shown to be shared by or known to Respondent. (See, for example, App. p. 4137, line 21 - p. 4138, line 1, where social worker testified that one child in Respondent's family's household contracted gonorrhea, but admitted Respondent was not in the household at the time. Though the evidence would certainly draw an emotional response, the evidence is in no way related to Respondent, either as perpetrator or former victim). At any rate, the majority conceded that defense counsel did, in fact, interview family members (multiple times) as did others on the defense team, including the defense expert, Dr. Kuglar. (Appendix A, pp. 8-9). Therefore, counsel (and his defense team) was well aware of the defendant's background and character through these interviews.

evidence, and accepting the truism that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696, 104 S.Ct. at 2069. *See also Wiggins,* 539 U.S. at 538, 123 S.Ct. 2527(finding prejudice where state's evidence in support of death penalty was "far weaker" than in prior case).

The majority in the state court opinion at issue here acknowledged that the additional mitigation evidence Respondent presented in the collateral proceedings - - even after exhaustive investigation in post-conviction relief, with abundant time, well acknowledged resources, and reference to even the most tangentially related records and the most marginally mitigating circumstances to make a case for error - - simply does not show "the level of 'abuse, neglect, and predator and prey situations found in other cases,'" (Appendix A, p. 22); however, the majority nonetheless found the evidence "*may have swayed* the jury as in Wiggins." (Appendix A, p. 22)(emphasis added). The majority committed no error in comparing the mitigation cases in assessing prejudice; however, the majority erred in abandoning a full assessment of the less than "powerful mitigation" evidence gathered in collateral proceedings against the tremendous amount of solid evidence in aggravation:

> The question a reviewing court must answer in determining whether a petitioner was prejudiced by a failure to present such evidence, then, is not whether the evidence was as "powerful" as the mitigation evidence in *other* cases, *but rather whether the evidence was "powerful" enough to offset the aggravating evidence and demonstrate a*

reasonable probability of a different result in the petitioner's case.

Yarbrough v. Johnson, 520 F.3d 329, 342 (4th Cir. 2008)(emphasis added).

Here, where the evidence supported the finding beyond a reasonable doubt of six circumstances in aggravation, and where the evidence weighty evidence of Respondent's actual participation in the crimes, including evidence of his admitted sexual assault of the victim in the upstairs of the home, had the evidence offered in state collateral proceedings been heard at sentencing, it simply cannot be said that it is reasonably likely that the jury would have returned a different sentence. The state court, as clearly reflected in their "nothing to lose" standard, simply found the possibility of "some influence" on the jury was enough. Yet, the proper weighing of the evidence as a whole is essential to the fair determination of prejudice. South Carolina, however, is not alone in abandonment of precedent in favor of some lesser burden.

For example, in *Hawkins v. Coyle*, 547 F.3d 540 (6th Cir. 2008), the Sixth Circuit Court of Appeals recently reversed a grant of relief in the District Court finding that the record did not support a finding of prejudice. To show prejudice, Hawkins relied upon "affidavits submitted by nine of his family members during state post-conviction proceedings" that revealed a family alcohol abuse, discord in his parents relationship including physical assault, favoritism among siblings, depression as to a sister's death and suicide attempts at a young age. 547 F.3d at 550. The Circuit Court citing *Wiggins*, and several circuit court cases reviewing alleged deficiencies in mitigation investigation and presentation, cautioned that "such a finding of prejudice is not made lightly, especially where the petitioner was not a victim

of abuse and did not suffer from any mental disorders or difficulties." *Id.* "The district court held that this was sufficient to establish prejudice stating only that there 'is a reasonable probability that at least one juror would have found Hawkins to be less morally culpable in some way based on the fact that he had a troubled upbringing marked by depression and two attempts at suicide." Id. The Circuit Court concluded that the district erred in finding prejudice as "[t]hese affidavits describe a markedly less traumatic and abuse childhood and adolescence whose cases we have found the failure to investigate was prejudicial." 547 F.3d at 551. *See also Williams v. Allen*, 542 F.3d 1326, 1343 (11th Cir. 2008)(reversing denial for relief, finding, in part, "Further supporting a finding of prejudice is the fact that this case is not highly aggravated... Here, the trial court imposed the death penalty on the basis of a single statutory aggravating circumstance-one that is an element of the underlying capital murder charge").

Further, in another striking example, in *Pinholster v. Ayers*, 525 F.3d 742, 766 -767 (9th Cir. 2008), a panel of the Ninth Circuit Court of Appeals reversed the District Court's grant of relief regarding the evaluation of the "new" mitigation evidence, consistently going back to consideration of the whole of the evidence. The concurring opinion in *Pinholster* demonstrates the struggle with adherence to the *Strickland* standard in light of *Wiggins* and *Rompilla*:

> I join Judge Tallman's opinion in full, but I do have one misgiving: I'm not sure whether *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), still allows us to "reweigh the evidence in aggravation against the totality of available

> mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), when counsel fails to uncover mitigating evidence. After all, counsel failed to uncover mitigating evidence in *Rompilla*, and the Supreme court didn't seem to address the aggravating evidence in assessing prejudice. *See Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456. Still I have a hard time believing that *Rompilla* overruled a recent case like *Wiggins* without bother to say so.

Pinholster, 525 F.3d at 773 (C.J. Kozinski, concurring).

Respondents note that *en banc* rehearing has been granted in the *Pinholster* case. The Ninth Circuit, by order dated March 20, 2009, has instructed that "[t]he three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit." *Pinholster v. Ayers*, 2009 WL 764671 (9th Cir. 2009). Thus, it appears the struggle over proper evaluation of new mitigation evidence and prejudice is not yet complete in the referenced case.

A similar struggle over the impact of new mitigation evidence may be found in state opinions, as well, often highlighted in dissents to the majority opinion, as is in the instant case. For instance in *Hannon v. State*, 941 So.2d 1109 (2006), the Florida Supreme Court criticized the dissenting opinion's " very one-sided presentation of postconviction witness testimony which creates a distorted view of Hannon's home life in an effort to bolster its assertion that trial counsel was ineffective for failing to conduct further investigation into mitigation" and noted that "in sentencing Hannon to death, the trial judge found substantial aggravation in

this case." 941 So.2d 1136. The dissent, however, relied on *Strickland* language that the result need not be different:

> To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. *The defendant is not required to show that the deficient performance "more likely than not altered the outcome in the case." Id.* at 693, 104 S.Ct. 2052. He must only show that unpresented available evidence "might well have influenced the jury's appraisal of [the defendant's] moral culpability" or "may alter the jury's selection of penalty." *Williams,* 529 U.S. at 398, 120 S.Ct. 1495; *see also Asay v. State,* 769 So.2d 974, 985 (Fla.2000) ("When evaluating claims that counsel was ineffective for failing to present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness 'deprived the defendant of a reliable penalty phase proceeding.' ").

Hannon, 941 So.2d at 1168 (Anstead, J. dissent)(emphasis added).

Again, this reasoning veers from the clear and precise language governing ineffective assistance of counsel claims in capital sentencing proceedings:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.*

Strickland, 466 U.S. at 695, 104 S.Ct. 2052 (emphasis added).

This Court should grant certiorari to again clarify the applicability of the *Strickland* standard in review of ineffective assistance of counsel sentencing phase issues.

CONCLUSION

In sum, there appears to be a number of courts that are struggling with applying the *Strickland* standard to capital sentencing ineffective assistance of counsel claims in light of *Williams*, *Wiggins* and *Rompilla*. Petitioner urges the Court to grant certiorari, affirm the *Strickland* standard, and reverse the state supreme court's decision that abandoned same in clarification of the applicability of this Court's precedent which remains

the final, binding authority on ineffective assistance of counsel claims in capital sentencing proceedings.

Respectfully submitted,

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March 30, 2009.
Columbia, South Carolina.

Appendix A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Donney S. Council, a/k/a
Donnie S. Council,
Respondent,

v.

State of South Carolina,
Petitioner.

ON WRIT OF CERTIORARI

Appeal From Aiken County
James R. Barber, Circuit Court Judge

Opinion No. 26543
Heard June 26, 2008 – Re-filed December 29, 2008

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Attorney General Henry
Dargan McMaster, Chief

Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Melody J. Brown, all of Columbia, for Petitioner.

Teresa L. Norris, of Blume, Weyble & Norris, of Columbia, Theresa Lee Clement, of Clement Law Office, of Columbia, for Respondent.

JUSTICE BEATTY: In this death penalty post-conviction relief (PCR) case, the Court granted the State's petition for a writ of certiorari to review the PCR judge's decision to: vacate Donney S. Council's (Respondent's) sentence of death; grant a new hearing for the penalty phase of his capital murder trial; and continue indefinitely one of his PCR grounds until Respondent regained competence. After we issued our original opinion affirming in part, reversing in part, and remanding for a new sentencing hearing, the State petitioned for rehearing. We deny the petition for rehearing, withdraw our original opinion, and substitute it with this opinion which revises footnote number seven.

FACTUAL/PROCEDURAL HISTORY

On the evening of October 9, 1992, police discovered the body of seventy-two-year-old Elizabeth Gatti underneath a bedspread in her basement. She had been

hogtied with a white cord and layers of duct tape were wrapped around her entire head. Her clothes had been ripped, and the crotch of her underwear had been cut out. Surrounding her body were various bottles of cleaning fluids which she had been forced to ingest. Mrs. Gatti had been sexually assaulted as evidenced by a gaping laceration extending from her vagina into the rectal area.

Respondent was arrested for the crimes on October 12, 1992. In two separate statements, Respondent admitted to being in Mrs. Gatti's house on the night she was killed and that he had sex with her. However, he denied committing the murder and implicated a man named "Frankie J," who Respondent alleged was present with him at the time of the crime. "Frankie J" was later identified as Frank Douglas. None of the physical evidence found in Mrs. Gatti's house or in her car matched Douglas.

Because Respondent admitted to being in Mrs. Gatti's home when the crime took place, trial counsel pursued the theory that Respondent did not murder Mrs. Gatti but was merely present at the time of the crime. The jury found Respondent guilty of murder, administering poison, first-degree burglary, grand larceny of a motor vehicle, petty larceny, kidnapping, and two counts of first-degree criminal sexual conduct (CSC).

Prior to the beginning of the penalty phase, trial counsel moved to allow into evidence the results of Frank Douglas' polygraph test which indicated deception. Trial counsel sought to present this evidence to the jury in an effort to establish that Douglas was the actual perpetrator and Respondent was merely

present at the time of the crime.[1] The trial judge declined to admit the polygraph test.

As part of its case, the State called several witnesses to testify regarding Respondent's juvenile and adult records as well as his numerous disciplinary problems while incarcerated for these offenses at the Department of Juvenile Justice (DJJ) and the Department of Corrections (DOC). The testimony established that Respondent entered the DJJ system at ten years old with his adult criminal activity escalating to more violent offenses which included resisting arrest, assault and battery with intent to kill, and armed robbery. After outlining Respondent's prior record, the State offered testimony to establish the aggravating circumstances surrounding Mrs. Gatti's murder.

In response, trial counsel offered Respondent's mother, Betty Council, as the sole defense witness. She told the jury that Respondent is the youngest of ten children. She testified she took Respondent to "mental health" between the ages of seven and fourteen and that he had been teased as a child while at school. She also showed the jury a childhood picture of Respondent. Respondent's mother further testified that Respondent suffered third-degree burns from a cooking accident, and that the treating physician told her that it would "take effect" on Respondent. In terms of Respondent's adulthood, Respondent's mother testified that he has two young sons. When asked by defense counsel what she would do as Respondent's mother when faced with the jury's decision as to life without parole or death, she pleaded for the jury to impose a life sentence.

The jury found beyond a reasonable doubt that the murder was committed in the commission of the

following aggravating circumstances: criminal sexual conduct; kidnapping; burglary; larceny with the use of a deadly weapon; killing by poison; and physical torture. As a result, the jury recommended Respondent be sentenced to death. The trial judge denied all of Respondent's post-trial motions and ordered Respondent to be put to death on December 6, 1996.

On appeal, this Court affirmed Respondent's convictions and sentences. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). After the United States Supreme Court denied Respondent's petition for a writ of certiorari,[2] he petitioned this Court for a stay of execution to pursue state PCR remedies.

Following this Court's grant of the stay, Respondent filed his initial PCR application. Shortly thereafter, Respondent indicated that he wished to withdraw his PCR application and be executed. Pursuant to this request, a hearing was held before the circuit court on December 8, 2000. As a result of this hearing, the circuit court judge ordered a competency evaluation of Respondent. Three months later, the Department of Mental Health found that Respondent was not competent to waive PCR or be executed because he suffered from schizophrenia, undifferentiated type. Respondent's PCR counsel then moved to stay the PCR proceedings.

After a hearing, a circuit court judge ordered the capital PCR proceedings to be stayed indefinitely due to Respondent's incompetence. The State petitioned for and was granted certiorari by this Court to review the circuit court's order. This Court set aside the stay and ordered the PCR proceedings to continue. Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004).

Following this Court's decision, Respondent filed two amended applications. In his final application, Respondent alleged he was entitled to relief based on the following grounds: ineffective assistance of counsel during voir dire and jury selection; ineffective assistance of counsel during the sentencing phase for: (i) failing to obtain a mitigation investigator or to otherwise adequately prepare and present powerful mitigating evidence; (ii) failing to develop a consistent, credible theme for a sentence of life imprisonment; (iii) failing to obtain the assistance of a pathologist and failing to challenge the testimony of the State's expert pathologist regarding the circumstances surrounding Mrs. Gatti's death; Respondent may not be executed because he is incompetent; ineffective assistance of counsel in investigating Respondent's competency to stand trial; and ineffective assistance of counsel in investigating Respondent's mental state at the time of the offenses.

At the hearing, PCR counsel called Respondent as a witness. However, due to his incompetence, Respondent was essentially unintelligible in his testimony. As a second witness, PCR counsel called Dr. Tora Brawley, a clinical neuropsychologist who reviewed Respondent's records and interviewed several of his family members. Based on the results of a battery of tests, Dr. Brawley believed there was evidence of brain dysfunction, particularly in the frontal lobe. Dr. Brawley testified Respondent began having problems when he was seven years old. Although Respondent had an I.Q. of 106 at that time, he was diagnosed with a learning disability and enrolled in special education classes. When Respondent was tested again at ten years old, his I.Q. had dropped approximately twenty-three points. In Dr.

Brawley's opinion, this significant decrease represented an overall decline in general cognitive functioning.

Next, PCR counsel called Marjorie Hammock a forensic social worker who compiled a "social family history" for Respondent. Based on her investigation, Hammock found that several of Respondent's family members suffered from mental illness, were involved in criminal activity, and have "significant educational deficit problems." Hammock also discovered that Respondent's father was an alcoholic who was extremely violent. Divorce records indicated Respondent's mother was granted a divorce on the ground of physical cruelty. After the father left the home, Respondent's family moved at least seven times from one bad neighborhood to another and lived in several homes which did not have running water and indoor plumbing. The family members also depended on government assistance for their financial existence. Respondent's individual records revealed that he: failed the first, seventh, and ninth grades; suffered two head injuries prior to the age of ten years old; suffered a burn injury which occurred when he was cooking without adult supervision at age seven; was treated at seven or eight years old for nervousness, sleepwalking, and nightmares at the local mental health center; and had attempted suicide.

The next witness called by PCR counsel was Dr. Donna Schwartz-Watts, a forensic psychiatrist who began evaluating Respondent in the summer of 1999. At that time, she believed Respondent was acutely psychotic and unable to assist his appellate counsel due to his "paranoid ideation" and "delusions of grandeur." In 2001, Dr. Schwartz-Watts conducted an additional evaluation of Respondent in preparation for a

competency hearing. Dr. Schwartz-Watts diagnosed Respondent with "undifferentiated schizophrenia," which she believed began in early adolescence or childhood.

In its case, the State called James Whittle, Jr., Respondent's lead trial counsel. In terms of trial preparation, Whittle testified he filed pre-trial motions seeking the following records: DJJ records; school records; state mental health records, as well as Respondent's family's DSS records; and records from the vocational school attended by Respondent. Whittle turned the records he obtained over to Dr. Everett Kuglar, a forensic psychiatrist who was court-appointed on August 8, 1995, for his evaluation of Respondent. Although Dr. Kuglar reviewed these records, trial counsel decided not to call him as a witness because he believed the State's cross-examination would have hurt the case.

In terms of compiling additional mitigation evidence, Whittle met with several of Respondent's family members. However, Whittle testified they did not offer anything that could be used in mitigation. Additionally, Whittle filed a motion seeking authorization and funding approval for a social history investigator to aid in preparing mitigation evidence. After receiving all of the requested records through the efforts of his investigator and law partner, Whittle decided not to procure a social history investigator even though funding had been approved.

Instead of offering social history evidence, Whittle focused on presenting the defense theory that Respondent did not participate in the murder but was merely present when Douglas committed the murder.

Whittle believed the strongest mitigating evidence was Respondent's statement that he was not the perpetrator, the presence of another individual's DNA evidence at the scene, and Douglas' polygraph test which indicated deception. Based on this theory, Whittle testified he wanted to be consistent throughout the guilt phase and the penalty phase and that "it was basically an all-or-nothing approach." Because he believed the trial judge's decision not to admit Douglas' polygraph results limited what he could do in mitigation, Whittle decided to only call Respondent's mother as a witness.

In his deposition, Dr. Kuglar testified he was court appointed in August 1995, but did not meet with Respondent until September 1996 when Whittle scheduled the first meeting. He stated the only records he received were Respondent's incomplete high school records and the state mental hospital records from 1992-93. Dr. Kuglar testified that he met with Respondent for the specific purpose of evaluating Respondent's mental competency and criminal responsibility. Additionally, Dr. Kuglar testified that although he met with several members of Respondent's family, the interviews were not "very satisfactory of getting anything.'

The PCR judge partially denied Respondent's application for relief, finding trial counsel was not ineffective: (1) during voir dire and jury selection; and (2) during sentencing for failing to develop a credible theme, failing to obtain an independent pathologist, and failing to investigate whether Respondent was mentally competent to stand trial.

The PCR judge granted Respondent relief, finding trial counsel's conduct was both deficient and prejudicial during the penalty phase of the trial in that he failed to adequately prepare and present evidence in mitigation. Relying extensively on the United States Supreme Court's opinion in Wiggins,[3] the judge found trial counsel was deficient in failing to obtain Respondent's background records prior to the beginning of trial. The judge also found that trial counsel neglected to pursue Respondent's earlier childhood records even though mental health records revealed that Respondent had a significant drop in I.Q. between the ages of seven and ten and had been medicated to "settle his nerves" during this time period. Additionally, the judge found trial counsel "unreasonably failed to expand the investigation to include obtaining records of [Respondent's] immediate family members" and to conduct more than just "limited" interviews with Respondent's family. The PCR judge also found trial counsel's conduct regarding Dr. Kuglar was unreasonable given trial counsel failed to provide him with adequate records and only asked him to examine Respondent with respect to the issues of competency to stand trial and his criminal responsibility or capacity at the time of the offenses.

The judge concluded this deficient conduct was prejudicial to Respondent, stating "[i]f counsel had adequately investigated and presented the available mitigation evidence, the jury would have heard substantial evidence in mitigation which was presented by [Respondent] in the PCR hearing." Ultimately, the PCR judge set aside Respondent's death sentence and ordered a new sentencing trial.

As to Respondent's remaining grounds, the judge ruled the allegation that Respondent should not be executed because he is incompetent was not ripe for consideration. The judge found that even though Respondent was incompetent under the standards of Singleton[4] the issue would not be procedurally proper until execution was imminent. Moreover, given his decision to set aside Respondent's death sentence, the judge concluded that no remedy was necessary. Finally, the judge held the allegation that Respondent was incompetent at the time of the offenses and trial counsel was ineffective for failing to adequately investigate Respondent's mental state should be continued until such time as Respondent regains competence.

The State petitioned for and was granted certiorari by this Court to consider the PCR judge's decision to vacate Respondent's death sentence and to grant a continuance as to whether trial counsel was ineffective in failing to adequately investigate Respondent's mental state at the time of the offenses.

DISCUSSION

I.

The State argues the PCR judge erred in finding trial counsel was ineffective in failing to investigate and present mitigation evidence. We disagree.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance

was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). We will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

Although the State admits that trial counsel did not obtain all records for Respondent's immediate family, it asserts trial counsel adequately investigated Respondent's background and was aware of his disadvantaged background, learning disabilities, family turmoil, his siblings' criminal activities, his prior record, and his drug use. In light of trial counsel's investigation, the State avers there is no evidence to support the PCR judge's ruling because trial counsel made an informed, strategic decision to omit certain mitigating evidence in an effort to present a consistent theory that Respondent was present but did not participate in Mrs. Gatti's murder. Even if trial counsel's conduct is found to have been deficient, the State asserts Respondent failed to establish that he was prejudiced.

As will be more fully discussed, we hold the PCR judge correctly determined that trial counsel was ineffective in failing to adequately investigate and present mitigating evidence.

Initially, we believe the PCR judge properly relied on the United States Supreme Court's decision in Wiggins v. Smith, 539 U.S. 510 (2003). In Wiggins, the defendant was tried and convicted for capital murder

before a judge. After his conviction, the defendant elected to be sentenced by a jury. Id. at 515. In a pre-sentencing motion, defendant's counsel sought to bifurcate the proceedings so that he could first present his theory that the defendant did not act as the principal in killing the victim. Counsel then intended to present a mitigation case. After this motion was denied, the sentencing proceeding commenced immediately. Although counsel made a general reference to the defendant's "difficult life," counsel did not present any evidence of the defendant's life history. The jury sentenced Wiggins to death. On appeal, Wiggins' convictions and sentences were affirmed. Id. at 516.

Subsequently, Wiggins filed an application for post-conviction relief, alleging his trial attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background. Id. at 516. After he exhausted his state PCR remedies, Wiggins filed a petition for habeas corpus in federal district court. The federal court's grant of relief was reversed by the Fourth Circuit, which held that Wiggins' trial counsel made "a reasonable strategic decision to focus on petitioner's direct responsibility." Id. at 519.

The United States Supreme Court granted certiorari and reversed the Fourth Circuit's decision. The Supreme Court found trial counsel was ineffective in failing to adequately prepare and present mitigating evidence. Although trial counsel obtained a pre-sentencing investigation report and DSS records, which revealed Wiggins' tumultuous childhood and low I.Q., counsel failed to investigate further. Counsel also chose not to retain a forensic social worker despite the fact that funds were made available to commission a social

history report. Id. at 524. The Court found counsel's decision not to expand their investigation beyond the retained records was unreasonable given it fell short of professional state standards and the American Bar Association standards governing capital defense work. Id.

The Court also determined that counsel's performance prejudiced Wiggins. Specifically, the Court found that had trial counsel further investigated they would have discovered the following powerful mitigating evidence: Wiggins was abused by his alcoholic mother during the first six years of his life; he suffered physical and sexual abuse while in foster care; he was homeless at times; and suffered from diminished mental capacities. Id. at 535. Given the strength of the mitigating evidence, the Court believed there was a reasonable probability that the jury would have returned a different sentence had they been presented with this evidence. Id. Not only did the Court find that it was unreasonable for counsel not to investigate and present this mitigating evidence, it also rejected counsel's assertion that the omission of the evidence constituted a trial strategy.

In recent decisions, this Court has adhered to the principles and analysis in Wiggins in determining whether counsel was ineffective in failing to thoroughly investigate potential guilt and penalty phase evidence. See Ard v. Catoe, 372 S.C. 318, 332 n.14, 642 S.E.2d 590, 597 n.14 (2007), cert. denied, Ozmint v. Ard, 128 S. Ct. 370 (2007) (referencing Wiggins and affirming PCR court's decision finding trial counsel ineffective in failing to further investigate gunshot residue evidence in capital murder case); Nance v. Ozmint, 367 S.C. 547, 557 n.8, 626 S.E.2d 878, 883 n.8 (2006), cert. denied,

127 S. Ct. 131 (2006) (noting the holding in Wiggins and concluding defense counsel in capital murder case should have, among other things, investigated and presented evidence of defendant's "adaptability" to confinement and presented mitigating social history evidence outlining defendant's troubled childhood and mental illness); Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004), cert. denied, 544 U.S. 943 (2005) (concluding case was sufficiently analogous to Wiggins and holding that trial counsel in capital murder case was ineffective in failing to adequately prepare and present evidence in the penalty phase that defendant suffered from severe, chronic depression at the time of the murder given trial counsel failed to provide expert witness with crucial medical records and related information which prevented witness from conveying an accurate diagnosis of defendant's mental condition to the jury).

Applying the foregoing to the facts of the instant case, we find the PCR judge correctly relied on Wiggins and there is evidence to support his finding that Respondent's trial counsel was deficient in failing to sufficiently investigate and present mitigating evidence.

We believe it was unreasonable for trial counsel not to further investigate Respondent's background and present even the minimal mitigating evidence that was obtained. Initially, trial counsel was deficient in not beginning his investigation into Respondent's background once the State served its notice of intent to seek the death penalty, counsel discovered that Respondent's DNA was found at the scene of the crime, and counsel learned of Respondent's inculpatory statements to police indicating that he sexually

assaulted the victim. Clearly, counsel should have been aware that the defense accomplice theory was not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life sentence. Yet, despite this knowledge, trial counsel: only obtained the DJJ and state hospital records before trial; did not request certain background records until the day of jury selection; did not set up a meeting between Dr. Kuglar and Respondent until one month before trial; and provided Dr. Kuglar with only limited records. As in Wiggins, counsel's conduct fell below the standards set by the ABA. See American Bar Association Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases, 11.4.1(2)(C) (1989) (once counsel is appointed in any case in which the death penalty is a possible punishment, he or she should begin, among other things, collecting information relevant to the sentencing phase including, but not limited to: medical history, educational history, family and social history, and prior adult and juvenile record).[5]

Even the limited information obtained should have put counsel on notice that Respondent's background, with additional investigation, could potentially yield powerful mitigating evidence. See Williams v. Taylor, 529 U.S. 362, 398 (2000) ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (stating that mitigating evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); see also

Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 317-339 (1983) (discussing counsel's preparation of and impact of mitigating evidence in capital cases).

However, not only did counsel delay in investigating Respondent's background, he failed to conduct an adequate investigation. Significantly, he failed to provide his only expert witness, Dr. Kuglar, with sufficient records and only directed him to evaluate Respondent's competency to stand trial and criminal responsibility. Additionally, Dr. Kuglar, at the direction of counsel, only met with Respondent on two occasions, the first being shortly before trial.

Furthermore, even though the funding was available, trial counsel chose not to hire a social history investigator. Instead, he relied on his law partner and private investigator to collect potentially relevant information. However, neither of these individuals was qualified, in terms of social work experience, to evaluate the information to assess Respondent's background.

Finally, we believe it was unreasonable for trial counsel not to obtain Respondent's family records. First, it is inexplicable that trial counsel deemed these records unimportant because they did not directly involve Respondent. See Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (stating "'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems may be less culpable than defendants who

have no such excuse'" (quoting California v. Brown, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring))), abrogated by Atkins v. Virginia, 536 U.S. 304 (2002) (holding executions of mentally retarded criminals constituted cruel and unusual punishments prohibited by the Eighth Amendment); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation."); American Bar Association Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases, 11.8.3(F)(1) (1989) (in preparing for the sentencing phase, trial counsel should consider investigating "[w]itnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client"); 11.8.6(B)(5) (stating that trial counsel should consider presenting in mitigation: "Family, and social history . . . professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof"). Secondly, even counsel's brief interviews with several of Respondent's family members and the DJJ records should have alerted him to the fact that the family was dysfunctional, Respondent had been raised in a violent home environment, and experienced learning disabilities. All of these factors constituted mitigating evidence and warranted further investigation.

Even if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence. Trial counsel's mitigation presentation consisted solely of Respondent's mother's extremely limited testimony.

Additionally, we disagree with the State's argument that Respondent is not entitled to post-conviction relief given trial counsel made a strategic decision not to present additional evidence in mitigation. "[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). For several reasons, counsel's decision was not reasonable and any strategic reason asserted would not excuse the deficient conduct.

First, as outlined above, counsel's investigation was inadequate and incomplete. "This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)). Secondly, counsel was already aware the jury had rejected the defense theory that Respondent was not the actual perpetrator but was merely present. Therefore, counsel's "all or nothing" approach was unreasonable. Thirdly, it would not have been inconsistent for trial counsel to have pursued this theory in the guilt phase but then offered mitigating evidence in the penalty phase. Clearly, trial counsel could have argued to the jury that even if Respondent was the actual perpetrator he suffered from these mental deficiencies and mental illness at the time of the crime. As the Supreme Court indicated in Wiggins, it is not inconsistent to present the accomplice theory

during the guilt phase but mitigation evidence in the penalty phase. Wiggins, 539 U.S. at 535 ("While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two sentencing strategies are not necessarily mutually exclusive."). Finally, given the State had already presented damaging character evidence, we do not believe Respondent's character could have been damaged any further by the presentation of additional mitigating evidence. Trial counsel essentially would have had "nothing to lose" and "everything to gain" by presenting this evidence.

Based on the foregoing, we hold the PCR judge properly found trial counsel's conduct was deficient. There is also evidence to support his finding that Respondent was prejudiced by counsel's deficient performance.

"When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)). This Court explained, "[t]he bottom line is that we must determine whether or not [Respondent] has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about [Respondent's] mental condition. In making this determination, we must consider the

totality of the evidence before the jury." Jones, 332 S.C. at 333, 504 S.E.2d at 824.

In light of Respondent's burden and this Court's standard of review, we agree with the PCR judge that counsel's deficient performance prejudiced Respondent. Admittedly, the State produced overwhelming evidence of Respondent's guilt[6] and the jury found six aggravating factors beyond a reasonable doubt. However, there was very strong mitigating evidence to be weighed against the aggravating circumstances presented by the State. We believe, as did the PCR judge, this evidence may well have influenced the jury's assessment of Respondent's culpability. See Rompilla v. Beard, 545 U.S. 374, 393 (2005) ("[A]lthough we suppose it is possible that a jury could have heard [the mitigation case] and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Respondent's] culpability'" (quoting Wiggins, 539 U.S. at 538)).

The only evidence presented in mitigation was Respondent's mother's brief testimony. Although the jury heard that Respondent had received mental health treatment between the ages of seven and fourteen, there was no medical evidence or other testimony describing his mental health issues or that several of his immediate family members suffered from mental illness. Furthermore, the jury never heard that: Respondent's father was an extremely violent alcoholic who was divorced by Respondent's mother on the ground of physical cruelty; Respondent and his siblings resided in bad neighborhoods, lived in poverty, and often lived in homes without running water or indoor

plumbing; Respondent and his siblings were neglected by their parents and, as a result, on one occasion Respondent suffered severe burns while trying to cook without supervision; Respondent had a significant drop in his I.Q. between the ages of seven and ten which may have been the result of a head injury or the onset of mental illness; Respondent began getting into trouble at the age of ten years most likely as the result of his violent family environment and negative influence of his siblings; Respondent's immediate family members had been diagnosed with mental illnesses such as schizophrenia, schizoid, bipolar disorder, depression, and borderline personality disorder; Respondent had learning disabilities; DJJ caseworkers recognized Respondent's emotional and mental problems; Respondent began using drugs and alcohol at sixteen years old; Respondent attempted suicide in his twenties; Respondent has a borderline I.Q. and frontal lobe brain dysfunction; and the onset of Respondent's current diagnosis of schizophrenia may have begun in early adolescence or childhood.

Although this mitigating evidence may not have risen to the level of "abuse, neglect, and predator and prey situations found in other cases," as the State contends, it nevertheless may have swayed the jury as in Wiggins. See Rompilla, 545 U.S. at 390-93 (finding trial counsel's failure to investigate prior conviction file which revealed mitigation evidence concerning defendant's mental health issues, troubled upbringing, and alcoholism fell below the level of reasonable performance and was prejudicial to defendant in death penalty case); Williams v. Taylor, 529 U.S. 362, 397-98 (2000) (finding defendant in capital murder case was prejudiced where trial counsel failed to investigate and

present substantial mitigating evidence during the sentencing phase given "the graphic description of [defendant's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability"); Von Dohlen, 360 S.C. at 608, 602 S.E.2d at 743 (holding trial counsel failed to adequately investigate and prepare expert testimony regarding petitioner's mental condition, "adjustment reaction disorder," severe chronic depression, and pathological intoxication, at the time of the murder and petitioner was prejudiced given the outcome of the trial might have been different had the jury heard the available information regarding petitioner's mental condition); cf. Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006) (reversing PCR judge's conclusion that capital defendant suffered prejudice from trial counsel's failure to offer sufficient social history evidence in the mitigation case where trial counsel interviewed a number of witnesses about defendant's childhood and life; hired a private investigator to gather background information on defendant; called several witnesses, including three experts, to offer mitigating evidence that defendant grew up in a drug environment, had trouble in school, had been abandoned, had a low I.Q., tested "highly abnormal" on the scales of paranoia, schizophrenia, and mania, suffered from chronic depression, ADD, and post-traumatic stress-disorder, and had a history of drug and alcohol abuse); Jones, 332 S.C. at 336-39, 504 S.E.2d at 826-27 (holding capital defendant was not prejudiced by trial counsel's alleged failure to thoroughly investigate and present mitigating evidence regarding his mental impairments where the following evidence was presented in

mitigation: six witnesses, who were familiar with defendant's background, testified regarding defendant's learning difficulties and "unusual behavior;" a clinical psychologist who testified that defendant had "some mental deficiency," was "mentally retarded," had some brain damage, and acted impulsively; concluding that "new" evidence presented at PCR hearing was the same as trial evidence and at best was a "fancier mitigation case").

In sum, we believe there is evidence to support the PCR judge's conclusion that Respondent's trial counsel was ineffective in failing to adequately investigate and present mitigating evidence during the penalty phase of Respondent's trial.[7]

II.

The State argues the PCR judge erred in granting a continuance regarding whether Respondent's trial counsel was ineffective in failing to adequately investigate Respondent's mental competence at the time the crimes were committed. We agree.

The PCR judge found neither Dr. Kuglar nor the court-appointed examiners, who examined Respondent only for competence to stand trial, determined Respondent was mentally ill at the time of the crime. The judge noted, however, that Dr. Kuglar had not been provided with the necessary and relevant background information to make this determination. The judge believed that Dr. Kuglar would have found "plenty of red flags pointing up to a need to test further."

The PCR judge opined "[a]ll of this information raises questions about whether [Respondent] was mentally ill prior to these offenses and what if any impact his

mental illness had on his thinking and behavior at the time of these offenses." The judge believed these questions were not adequately addressed prior to trial because the court-appointed examinations were conducted solely on the issue of competence to stand trial. Furthermore, the judge found that Dr. Schwartz-Watts was unable to adequately examine Respondent with respect to his mental state at the time of the crimes due to his current state of incompetence.

In light of these findings, the PCR judge ruled the issue of whether Respondent's trial counsel was ineffective for failing to adequately investigate Respondent's mental state at the time of the crime was a "fact-based challenge to his defense counsel's conduct at trial that cannot be adequately addressed until [Respondent] regains competence." As a result, the judge granted a continuance staying review of this allegation until Respondent regains competence.[8]

We agree with the State's assertion that the PCR judge's legal conclusions are "flawed." We find the PCR judge analyzed this issue without properly applying the rule adopted by this Court in Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004).

Initially, there appears to be no dispute that Respondent was, and is currently, incompetent. Thus, pursuant to the mandate in Council v. Catoe,[9] the PCR judge should have ruled on the allegation for relief unless Respondent's PCR counsel could establish that this issue constituted a "fact-based challenge" to Respondent's counsel's conduct at trial. If Respondent's incompetency inhibited the PCR challenge, then a continuance would have been proper. We believe

Respondent's assistance was not required and, thus, the PCR allegation was properly before the judge.

In our view, the collateral attack on trial counsel's conduct regarding Respondent's mental state and criminal responsibility at the time of the crime was dependent on Respondent's records as well as the testimony of experts and others who observed Respondent around the time of the crime. Therefore, we do not believe Respondent's assistance or decision making was required. Moreover, all of the evidence needed to rule on this issue was presented at the PCR hearing. Specifically, the PCR judge had before him the trial transcript, the testimony of defense counsel, Dr. Kuglar, Dr. Brawley, and Dr. Schwartz-Watts, as well as Respondent's records. Accordingly, we find the PCR judge erred in granting a continuance.

In light of our holding, the question becomes whether this Court should rule on the merits of the ineffectiveness of counsel issue. Because this Court reviews PCR decisions pursuant to an "any evidence" standard, we find it is procedurally proper to remand this issue for the PCR judge to make a definitive ruling. On remand, the PCR court shall consider the evidentiary record established at the prior PCR hearing in addition to any relevant evidence admitted on remand.

CONCLUSION

Given there is evidence to support the PCR judge's holding that Respondent's trial counsel was ineffective in failing to investigate and present mitigating evidence at the penalty phase of Respondent's trial, we affirm the PCR judge's decision vacating Respondent's

sentence and ordering a new sentencing hearing. We, however, find the PCR judge erred in continuing indefinitely one of the PCR grounds until Respondent regains competence. Because Respondent's assistance is not required for PCR counsel to present the issue regarding whether Respondent's trial counsel was ineffective in failing to adequately investigate Respondent's mental competence at the time the crimes were committed, we reverse the PCR judge's order on this issue and remand for the PCR judge to rule based on the evidentiary record presented at the PCR hearing in addition to any relevant evidence admitted at the hearing on remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MOORE, WALLER and PLEICONES, JJ., concur. TOAL, C.J., concurring in part and dissenting in part in a separate opinion.

CHIEF JUSTICE TOAL: Although I agree that the PCR court erred in granting a continuance as to trial counsel's investigation of Respondent's mental competence at the time the crime was committed, I disagree with the majority regarding trial counsel's performance during the mitigation phase of trial. In my view, even assuming trial counsel was deficient in presenting mitigating evidence, Respondent was not prejudiced. Considering the overwhelming evidence against Respondent, the violent and brutal nature of this crime, and the fact that the jury found the existence of six aggravating factors beyond a reasonable doubt, in my opinion, it is not reasonably

likely that the jury would have returned a different sentence. *See Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (recognizing that the PCR applicant bears the burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional mitigation evidence); *see also Plath v. Moore*, 130 F.3d 595, 602 (4th Cir. 1997) (holding that, considering the "sheer magnitude" of the aggravating evidence, the defendant failed to show prejudice from trial counsel's failure to present certain mitigating evidence). Accordingly, I would reverse the PCR court's order finding trial counsel ineffective during the mitigation phase of Respondent's trial.

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[1] Counsel contended the polygraph test was relevant to establish the following two statutory mitigating circumstances: (1) Respondent was an accomplice in the murder committed by another person and his participation was relatively minor; and (2) Respondent acted under duress or under the domination of the other person. S.C. Code Ann. § 16-3-20(C)(b)(4), (5) (1985).

[2] Council v. South Carolina, 528 U.S. 1050 (1999).

[3] Wiggins v. Smith, 539 U.S. 510 (2003).

[4] In Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993), this Court adopted a two-prong analysis to determine a convicted defendant's competency to be executed.

[5] We note that these guidelines were revised in 2003. However, we cite to the 1989 guidelines given they were in effect at the time of Council's trial.

[6] In Council v. Catoe, 359 S.C. 120, 128, 597 S.E.2d 782, 786 (2004), this Court noted the State presented an overwhelming amount of evidence of Respondent's guilt.

[7] In no way should our decision be construed as minimizing the brutality of the victim's murder. We are, nevertheless, bound by a standard of review which mandates our affirmance of the PCR judge's decision if there is any probative evidence to support it. Moreover, we are cognizant of appellate decisions in this state which determined that counsel's deficient performance in a death penalty case did not warrant reversal where the error did not contribute to the verdict. See Plath v. Moore, 130 F.3d 595, 601-02 (4th Cir. 1997) (finding trial counsel's alleged failure to present additional mitigating evidence in sentencing phase of capital trial did not warrant habeas relief for petitioner; stating "in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor"); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (finding, in capital case, trial counsel's failure to object to unconstitutional malice charge was harmless where, beyond a reasonable doubt, the error did not contribute to the verdict in light of the overwhelming evidence of malice). We cannot say that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence for Respondent. Thus, we are unable to find

trial counsel's deficient performance was not prejudicial.

[8] The PCR judge inferred that it would be unlikely that Respondent would regain competence. Based on our review of the record and the opinion of Dr. Schwartz-Watts, we agree with the PCR judge's assessment. Thus, even if Respondent is sentenced to death after a re-sentencing hearing, we believe it is doubtful that he will ever be executed in light of our decision in Singleton.

[9] In Council v. Catoe, this Court stated:

> the default rule is that PCR hearings must proceed even though a petitioner is incompetent. For issues requiring the petitioner's competence to assist his PCR counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the PCR judge may grant a continuance, staying the review of those issues until petitioner regains his competence. All other PCR claims will not be subject to a continuance based on a petitioner's incompetence.

Council v. Catoe, 359 S.C. at 130, 597 S.E.2d at 787.

Appendix B

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Donney S. Council, a/k/a
Donnie S. Council,
Respondent,

v.

State of South Carolina,
Petitioner.

ON WRIT OF CERTIORARI

Appeal From Aiken County
James R. Barber, III, Circuit Court Judge

Opinion No. 26543
Heard June 26, 2008 – Filed September 8, 2008

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Melody J. Brown, all of Columbia, for Petitioner.

Teresa L. Norris, of Blume, Weyble & Norris, of Columbia, Theresa Lee Clement, of Clement Law Office, of Columbia, for Respondent.

JUSTICE BEATTY: In this death penalty post-conviction relief (PCR) case, the Court granted the State's petition for a writ of certiorari to review the PCR judge's decision to: vacate Donney S. Council's (Respondent's) sentence of death; grant a new hearing for the penalty phase of his capital murder trial; and continue indefinitely one of his PCR grounds until Respondent regained competence. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL HISTORY

On the evening of October 9, 1992, police discovered the body of seventy-two-year-old Elizabeth Gatti underneath a bedspread in her basement. She had been hogtied with a white cord and layers of duct tape were wrapped around her entire head. Her clothes had been

ripped, and the crotch of her underwear had been cut out. Surrounding her body were various bottles of cleaning fluids which she had been forced to ingest. Mrs. Gatti had been sexually assaulted as evidenced by a gaping laceration extending from her vagina into the rectal area.

Respondent was arrested for the crimes on October 12, 1992. In two separate statements, Respondent admitted to being in Mrs. Gatti's house on the night she was killed and that he had sex with her. However, he denied committing the murder and implicated a man named "Frankie J," who Respondent alleged was present with him at the time of the crime. "Frankie J" was later identified as Frank Douglas. None of the physical evidence found in Mrs. Gatti's house or in her car matched Douglas.

Because Respondent admitted to being in Mrs. Gatti's home when the crime took place, trial counsel pursued the theory that Respondent did not murder Mrs. Gatti but was merely present at the time of the crime. The jury found Respondent guilty of murder, administering poison, first-degree burglary, grand larceny of a motor vehicle, petty larceny, kidnapping, and two counts of first-degree criminal sexual conduct (CSC).

Prior to the beginning of the penalty phase, trial counsel moved to allow into evidence the results of Frank Douglas' polygraph test which indicated deception. Trial counsel sought to present this evidence to the jury in an effort to establish that Douglas was the actual perpetrator and Respondent was merely present at the time of the crime.[1] The trial judge declined to admit the polygraph test.

As part of its case, the State called several witnesses to testify regarding Respondent's juvenile and adult records as well as his numerous disciplinary problems while incarcerated for these offenses at the Department of Juvenile Justice (DJJ) and the Department of Corrections (DOC). The testimony established that Respondent entered the DJJ system at ten years old with his adult criminal activity escalating to more violent offenses which included resisting arrest, assault and battery with intent to kill, and armed robbery. After outlining Respondent's prior record, the State offered testimony to establish the aggravating circumstances surrounding Mrs. Gatti's murder.

In response, trial counsel offered Respondent's mother, Betty Council, as the sole defense witness. She told the jury that Respondent is the youngest of ten children. She testified she took Respondent to "mental health" between the ages of seven and fourteen and that he had been teased as a child while at school. She also showed the jury a childhood picture of Respondent. Respondent's mother further testified that Respondent suffered third-degree burns from a cooking accident, and that the treating physician told her that it would "take effect" on Respondent. In terms of Respondent's adulthood, Respondent's mother testified that he has two young sons. When asked by defense counsel what she would do as Respondent's mother when faced with the jury's decision as to life without parole or death, she pleaded for the jury to impose a life sentence.

The jury found beyond a reasonable doubt that the murder was committed in the commission of the following aggravating circumstances: criminal sexual conduct; kidnapping; burglary; larceny with the use of

a deadly weapon; killing by poison; and physical torture. As a result, the jury recommended Respondent be sentenced to death. The trial judge denied all of Respondent's post-trial motions and ordered Respondent to be put to death on December 6, 1996.

On appeal, this Court affirmed Respondent's convictions and sentences. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). After the United States Supreme Court denied Respondent's petition for a writ of certiorari,[2] he petitioned this Court for a stay of execution to pursue state PCR remedies.

Following this Court's grant of the stay, Respondent filed his initial PCR application. Shortly thereafter, Respondent indicated that he wished to withdraw his PCR application and be executed. Pursuant to this request, a hearing was held before the circuit court on December 8, 2000. As a result of this hearing, the circuit court judge ordered a competency evaluation of Respondent. Three months later, the Department of Mental Health found that Respondent was not competent to waive PCR or be executed because he suffered from schizophrenia, undifferentiated type. Respondent's PCR counsel then moved to stay the PCR proceedings.

After a hearing, a circuit court judge ordered the capital PCR proceedings to be stayed indefinitely due to Respondent's incompetence. The State petitioned for and was granted certiorari by this Court to review the circuit court's order. This Court set aside the stay and ordered the PCR proceedings to continue. Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004).

Following this Court's decision, Respondent filed two amended applications. In his final application, Respondent alleged he was entitled to relief based on the following grounds: ineffective assistance of counsel during voir dire and jury selection; ineffective assistance of counsel during the sentencing phase for: (i) failing to obtain a mitigation investigator or to otherwise adequately prepare and present powerful mitigating evidence; (ii) failing to develop a consistent, credible theme for a sentence of life imprisonment; (iii) failing to obtain the assistance of a pathologist and failing to challenge the testimony of the State's expert pathologist regarding the circumstances surrounding Mrs. Gatti's death; Respondent may not be executed because he is incompetent; ineffective assistance of counsel in investigating Respondent's competency to stand trial; and ineffective assistance of counsel in investigating Respondent's mental state at the time of the offenses.

At the hearing, PCR counsel called Respondent as a witness. However, due to his incompetence, Respondent was essentially unintelligible in his testimony. As a second witness, PCR counsel called Dr. Tora Brawley, a clinical neuropsychologist who reviewed Respondent's records and interviewed several of his family members. Based on the results of a battery of tests, Dr. Brawley believed there was evidence of brain dysfunction, particularly in the frontal lobe. Dr. Brawley testified Respondent began having problems when he was seven years old. Although Respondent had an I.Q. of 106 at that time, he was diagnosed with a learning disability and enrolled in special education classes. When Respondent was tested again at ten years old, his I.Q. had dropped approximately twenty-three points. In Dr.

Brawley's opinion, this significant decrease represented an overall decline in general cognitive functioning.

Next, PCR counsel called Marjorie Hammock a forensic social worker who compiled a "social family history" for Respondent. Based on her investigation, Hammock found that several of Respondent's family members suffered from mental illness, were involved in criminal activity, and have "significant educational deficit problems." Hammock also discovered that Respondent's father was an alcoholic who was extremely violent. Divorce records indicated Respondent's mother was granted a divorce on the ground of physical cruelty. After the father left the home, Respondent's family moved at least seven times from one bad neighborhood to another and lived in several homes which did not have running water and indoor plumbing. The family members also depended on government assistance for their financial existence. Respondent's individual records revealed that he: failed the first, seventh, and ninth grades; suffered two head injuries prior to the age of ten years old; suffered a burn injury which occurred when he was cooking without adult supervision at age seven; was treated at seven or eight years old for nervousness, sleepwalking, and nightmares at the local mental health center; and had attempted suicide.

The next witness called by PCR counsel was Dr. Donna Schwartz-Watts, a forensic psychiatrist who began evaluating Respondent in the summer of 1999. At that time, she believed Respondent was acutely psychotic and unable to assist his appellate counsel due to his "paranoid ideation" and "delusions of grandeur." In 2001, Dr. Schwartz-Watts conducted an additional evaluation of Respondent in preparation for a

competency hearing. Dr. Schwartz-Watts diagnosed Respondent with "undifferentiated schizophrenia," which she believed began in early adolescence or childhood.

In its case, the State called James Whittle, Jr., Respondent's lead trial counsel. In terms of trial preparation, Whittle testified he filed pre-trial motions seeking the following records: DJJ records; school records; state mental health records, as well as Respondent's family's DSS records; and records from the vocational school attended by Respondent. Whittle turned the records he obtained over to Dr. Everett Kuglar, a forensic psychiatrist who was court-appointed on August 8, 1995, for his evaluation of Respondent. Although Dr. Kuglar reviewed these records, trial counsel decided not to call him as a witness because he believed the State's cross-examination would have hurt the case.

In terms of compiling additional mitigation evidence, Whittle met with several of Respondent's family members. However, Whittle testified they did not offer anything that could be used in mitigation. Additionally, Whittle filed a motion seeking authorization and funding approval for a social history investigator to aid in preparing mitigation evidence. After receiving all of the requested records through the efforts of his investigator and law partner, Whittle decided not to procure a social history investigator even though funding had been approved.

Instead of offering social history evidence, Whittle focused on presenting the defense theory that Respondent did not participate in the murder but was merely present when Douglas committed the murder.

Whittle believed the strongest mitigating evidence was Respondent's statement that he was not the perpetrator, the presence of another individual's DNA evidence at the scene, and Douglas' polygraph test which indicated deception. Based on this theory, Whittle testified he wanted to be consistent throughout the guilt phase and the penalty phase and that "it was basically an all-or-nothing approach." Because he believed the trial judge's decision not to admit Douglas' polygraph results limited what he could do in mitigation, Whittle decided to only call Respondent's mother as a witness.

In his deposition, Dr. Kuglar testified he was court appointed in August 1995, but did not meet with Respondent until September 1996 when Whittle scheduled the first meeting. He stated the only records he received were Respondent's incomplete high school records and the state mental hospital records from 1992-93. Dr. Kuglar testified that he met with Respondent for the specific purpose of evaluating Respondent's mental competency and criminal responsibility. Additionally, Dr. Kuglar testified that although he met with several members of Respondent's family, the interviews were not "very satisfactory of getting anything."

The PCR judge partially denied Respondent's application for relief, finding trial counsel was not ineffective: (1) during voir dire and jury selection; and (2) during sentencing for failing to develop a credible theme, failing to obtain an independent pathologist, and failing to investigate whether Respondent was mentally competent to stand trial.

The PCR judge granted Respondent relief, finding trial counsel's conduct was both deficient and prejudicial during the penalty phase of the trial in that he failed to adequately prepare and present evidence in mitigation. Relying extensively on the United States Supreme Court's opinion in Wiggins,[3] the judge found trial counsel was deficient in failing to obtain Respondent's background records prior to the beginning of trial. The judge also found that trial counsel neglected to pursue Respondent's earlier childhood records even though mental health records revealed that Respondent had a significant drop in I.Q. between the ages of seven and ten and had been medicated to "settle his nerves" during this time period. Additionally, the judge found trial counsel "unreasonably failed to expand the investigation to include obtaining records of [Respondent's] immediate family members" and to conduct more than just "limited" interviews with Respondent's family. The PCR judge also found trial counsel's conduct regarding Dr. Kuglar was unreasonable given trial counsel failed to provide him with adequate records and only asked him to examine Respondent with respect to the issues of competency to stand trial and his criminal responsibility or capacity at the time of the offenses.

The judge concluded this deficient conduct was prejudicial to Respondent, stating "[i]f counsel had adequately investigated and presented the available mitigation evidence, the jury would have heard substantial evidence in mitigation which was presented by [Respondent] in the PCR hearing." Ultimately, the PCR judge set aside Respondent's death sentence and ordered a new sentencing trial.

As to Respondent's remaining grounds, the judge ruled the allegation that Respondent should not be executed because he is incompetent was not ripe for consideration. The judge found that even though Respondent was incompetent under the standards of Singleton[4] the issue would not be procedurally proper until execution was imminent. Moreover, given his decision to set aside Respondent's death sentence, the judge concluded that no remedy was necessary. Finally, the judge held the allegation that Respondent was incompetent at the time of the offenses and trial counsel was ineffective for failing to adequately investigate Respondent's mental state should be continued until such time as Respondent regains competence.

The State petitioned for and was granted certiorari by this Court to consider the PCR judge's decision to vacate Respondent's death sentence and to grant a continuance as to whether trial counsel was ineffective in failing to adequately investigate Respondent's mental state at the time of the offenses.

DISCUSSION

I.

The State argues the PCR judge erred in finding trial counsel was ineffective in failing to investigate and present mitigation evidence. We disagree.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance

was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). We will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

Although the State admits that trial counsel did not obtain all records for Respondent's immediate family, it asserts trial counsel adequately investigated Respondent's background and was aware of his disadvantaged background, learning disabilities, family turmoil, his siblings' criminal activities, his prior record, and his drug use. In light of trial counsel's investigation, the State avers there is no evidence to support the PCR judge's ruling because trial counsel made an informed, strategic decision to omit certain mitigating evidence in an effort to present a consistent theory that Respondent was present but did not participate in Mrs. Gatti's murder. Even if trial counsel's conduct is found to have been deficient, the State asserts Respondent failed to establish that he was prejudiced.

As will be more fully discussed, we hold the PCR judge correctly determined that trial counsel was ineffective in failing to adequately investigate and present mitigating evidence.

Initially, we believe the PCR judge properly relied on the United States Supreme Court's decision in Wiggins v. Smith, 539 U.S. 510 (2003). In Wiggins, the defendant was tried and convicted for capital murder

before a judge. After his conviction, the defendant elected to be sentenced by a jury. Id. at 515. In a pre-sentencing motion, defendant's counsel sought to bifurcate the proceedings so that he could first present his theory that the defendant did not act as the principal in killing the victim. Counsel then intended to present a mitigation case. After this motion was denied, the sentencing proceeding commenced immediately. Although counsel made a general reference to the defendant's "difficult life," counsel did not present any evidence of the defendant's life history. The jury sentenced Wiggins to death. On appeal, Wiggins' convictions and sentences were affirmed. Id. at 516.

Subsequently, Wiggins filed an application for post-conviction relief, alleging his trial attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background. Id. at 516. After he exhausted his state PCR remedies, Wiggins filed a petition for habeas corpus in federal district court. The federal court's grant of relief was reversed by the Fourth Circuit, which held that Wiggins' trial counsel made "a reasonable strategic decision to focus on petitioner's direct responsibility." Id. at 519.

The United States Supreme Court granted certiorari and reversed the Fourth Circuit's decision. The Supreme Court found trial counsel was ineffective in failing to adequately prepare and present mitigating evidence. Although trial counsel obtained a pre-sentencing investigation report and DSS records, which revealed Wiggins' tumultuous childhood and low I.Q., counsel failed to investigate further. Counsel also chose not to retain a forensic social worker despite the fact that funds were made available to commission a social

history report. Id. at 524. The Court found counsel's decision not to expand their investigation beyond the retained records was unreasonable given it fell short of professional state standards and the American Bar Association standards governing capital defense work. Id.

The Court also determined that counsel's performance prejudiced Wiggins. Specifically, the Court found that had trial counsel further investigated they would have discovered the following powerful mitigating evidence: Wiggins was abused by his alcoholic mother during the first six years of his life; he suffered physical and sexual abuse while in foster care; he was homeless at times; and suffered from diminished mental capacities. Id. at 535. Given the strength of the mitigating evidence, the Court believed there was a reasonable probability that the jury would have returned a different sentence had they been presented with this evidence. Id. Not only did the Court find that it was unreasonable for counsel not to investigate and present this mitigating evidence, it also rejected counsel's assertion that the omission of the evidence constituted a trial strategy.

In recent decisions, this Court has adhered to the principles and analysis in Wiggins in determining whether counsel was ineffective in failing to thoroughly investigate potential guilt and penalty phase evidence. See Ard v. Catoe, 372 S.C. 318, 332 n.14, 642 S.E.2d 590, 597 n.14 (2007), cert. denied, Ozmint v. Ard, 128 S. Ct. 370 (2007) (referencing Wiggins and affirming PCR court's decision finding trial counsel ineffective in failing to further investigate gunshot residue evidence in capital murder case); Nance v. Ozmint, 367 S.C. 547, 557 n.8, 626 S.E.2d 878, 883 n.8 (2006), cert. denied,

127 S. Ct. 131 (2006) (noting the holding in Wiggins and concluding defense counsel in capital murder case should have, among other things, investigated and presented evidence of defendant's "adaptability" to confinement and presented mitigating social history evidence outlining defendant's troubled childhood and mental illness); Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004), cert. denied, 544 U.S. 943 (2005) (concluding case was sufficiently analogous to Wiggins and holding that trial counsel in capital murder case was ineffective in failing to adequately prepare and present evidence in the penalty phase that defendant suffered from severe, chronic depression at the time of the murder given trial counsel failed to provide expert witness with crucial medical records and related information which prevented witness from conveying an accurate diagnosis of defendant's mental condition to the jury).

Applying the foregoing to the facts of the instant case, we find the PCR judge correctly relied on Wiggins and there is evidence to support his finding that Respondent's trial counsel was deficient in failing to sufficiently investigate and present mitigating evidence.

We believe it was unreasonable for trial counsel not to further investigate Respondent's background and present even the minimal mitigating evidence that was obtained. Initially, trial counsel was deficient in not beginning his investigation into Respondent's background once the State served its notice of intent to seek the death penalty, counsel discovered that Respondent's DNA was found at the scene of the crime, and counsel learned of Respondent's inculpatory statements to police indicating that he sexually

assaulted the victim. Clearly, counsel should have been aware that the defense accomplice theory was not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life sentence. Yet, despite this knowledge, trial counsel: only obtained the DJJ and state hospital records before trial; did not request certain background records until the day of jury selection; did not set up a meeting between Dr. Kuglar and Respondent until one month before trial; and provided Dr. Kuglar with only limited records. As in Wiggins, counsel's conduct fell below the standards set by the ABA. See American Bar Association Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases, 11.4.1(2)(C) (1989) (once counsel is appointed in any case in which the death penalty is a possible punishment, he or she should begin, among other things, collecting information relevant to the sentencing phase including, but not limited to: medical history, educational history, family and social history, and prior adult and juvenile record).[5]

Even the limited information obtained should have put counsel on notice that Respondent's background, with additional investigation, could potentially yield powerful mitigating evidence. See Williams v. Taylor, 529 U.S. 362, 398 (2000) ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (stating that mitigating evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); see also

Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 317-339 (1983) (discussing counsel's preparation of and impact of mitigating evidence in capital cases).

However, not only did counsel delay in investigating Respondent's background, he failed to conduct an adequate investigation. Significantly, he failed to provide his only expert witness, Dr. Kuglar, with sufficient records and only directed him to evaluate Respondent's competency to stand trial and criminal responsibility. Additionally, Dr. Kuglar, at the direction of counsel, only met with Respondent on two occasions, the first being shortly before trial.

Furthermore, even though the funding was available, trial counsel chose not to hire a social history investigator. Instead, he relied on his law partner and private investigator to collect potentially relevant information. However, neither of these individuals was qualified, in terms of social work experience, to evaluate the information to assess Respondent's background.

Finally, we believe it was unreasonable for trial counsel not to obtain Respondent's family records. First, it is inexplicable that trial counsel deemed these records unimportant because they did not directly involve Respondent. See Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (stating "'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems may be less culpable than defendants who

have no such excuse'" (quoting California v. Brown, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring))), abrogated by Atkins v. Virginia, 536 U.S. 304 (2002) (holding executions of mentally retarded criminals constituted cruel and unusual punishments prohibited by the Eighth Amendment); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation."); American Bar Association Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases, 11.8.3(F)(1) (1989) (in preparing for the sentencing phase, trial counsel should consider investigating "[w]itnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client"); 11.8.6(B)(5) (stating that trial counsel should consider presenting in mitigation: "Family, and social history . . . professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof"). Secondly, even counsel's brief interviews with several of Respondent's family members and the DJJ records should have alerted him to the fact that the family was dysfunctional, Respondent had been raised in a violent home environment, and experienced learning disabilities. All of these factors constituted mitigating evidence and warranted further investigation.

Even if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence. Trial counsel's mitigation presentation consisted solely of Respondent's mother's extremely limited testimony.

Additionally, we disagree with the State's argument that Respondent is not entitled to post-conviction relief given trial counsel made a strategic decision not to present additional evidence in mitigation. "[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). For several reasons, counsel's decision was not reasonable and any strategic reason asserted would not excuse the deficient conduct.

First, as outlined above, counsel's investigation was inadequate and incomplete. "This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)). Secondly, counsel was already aware the jury had rejected the defense theory that Respondent was not the actual perpetrator but was merely present. Therefore, counsel's "all or nothing" approach was unreasonable. Thirdly, it would not have been inconsistent for trial counsel to have pursued this theory in the guilt phase but then offered mitigating evidence in the penalty phase. Clearly, trial counsel could have argued to the jury that even if Respondent was the actual perpetrator he suffered from these mental deficiencies and mental illness at the time of the crime. As the Supreme Court indicated in Wiggins, it is not inconsistent to present the accomplice theory

during the guilt phase but mitigation evidence in the penalty phase. Wiggins, 539 U.S. at 535 ("While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two sentencing strategies are not necessarily mutually exclusive.") Finally, given the State had already presented damaging character evidence, we do not believe Respondent's character could have been damaged any further by the presentation of additional mitigating evidence. Trial counsel essentially would have had "nothing to lose" and "everything to gain" by presenting this evidence.

Based on the foregoing, we hold the PCR judge properly found trial counsel's conduct was deficient. There is also evidence to support his finding that Respondent was prejudiced by counsel's deficient performance.

"When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)). This Court explained, "[t]he bottom line is that we must determine whether or not [Respondent] has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about [Respondent's] mental condition. In making this determination, we must consider the

totality of the evidence before the jury." Jones, 332 S.C. at 333, 504 S.E.2d at 824.

In light of Respondent's burden and this Court's standard of review, we agree with the PCR judge that counsel's deficient performance prejudiced Respondent. Admittedly, the State produced overwhelming evidence of Respondent's guilt[6] and the jury found six aggravating factors beyond a reasonable doubt. However, there was very strong mitigating evidence to be weighed against the aggravating circumstances presented by the State. We believe, as did the PCR judge, this evidence may well have influenced the jury's assessment of Respondent's culpability. See Rompilla v. Beard, 545 U.S. 374, 393 (2005) ("[A]lthough we suppose it is possible that a jury could have heard [the mitigation case] and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Respondent's] culpability'" (quoting Wiggins, 539 U.S. at 538)).

The only evidence presented in mitigation was Respondent's mother's brief testimony. Although the jury heard that Respondent had received mental health treatment between the ages of seven and fourteen, there was no medical evidence or other testimony describing his mental health issues or that several of his immediate family members suffered from mental illness. Furthermore, the jury never heard that: Respondent's father was an extremely violent alcoholic who was divorced by Respondent's mother on the ground of physical cruelty; Respondent and his siblings resided in bad neighborhoods, lived in poverty, and often lived in homes without running water or indoor

plumbing; Respondent and his siblings were neglected by their parents and, as a result, on one occasion Respondent suffered severe burns while trying to cook without supervision; Respondent had a significant drop in his I.Q. between the ages of seven and ten which may have been the result of a head injury or the onset of mental illness; Respondent began getting into trouble at the age of ten years most likely as the result of his violent family environment and negative influence of his siblings; Respondent's immediate family members had been diagnosed with mental illnesses such as schizophrenia, schizoid, bipolar disorder, depression, and borderline personality disorder; Respondent had learning disabilities; DJJ caseworkers recognized Respondent's emotional and mental problems; Respondent began using drugs and alcohol at sixteen years old; Respondent attempted suicide in his twenties; Respondent has a borderline I.Q. and frontal lobe brain dysfunction; and the onset of Respondent's current diagnosis of schizophrenia may have begun in early adolescence or childhood.

Although this mitigating evidence may not have risen to the level of "abuse, neglect, and predator and prey situations found in other cases," as the State contends, it nevertheless may have swayed the jury as in Wiggins. See Rompilla, 545 U.S. at 390-93 (finding trial counsel's failure to investigate prior conviction file which revealed mitigation evidence concerning defendant's mental health issues, troubled upbringing, and alcoholism fell below the level of reasonable performance and was prejudicial to defendant in death penalty case); Williams v. Taylor, 529 U.S. 362, 397-98 (2000) (finding defendant in capital murder case was prejudiced where trial counsel failed to investigate and

present substantial mitigating evidence during the sentencing phase given "the graphic description of [defendant's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability"); Von Dohlen, 360 S.C. at 608, 602 S.E.2d at 743 (holding trial counsel failed to adequately investigate and prepare expert testimony regarding petitioner's mental condition, "adjustment reaction disorder," severe chronic depression, and pathological intoxication, at the time of the murder and petitioner was prejudiced given the outcome of the trial might have been different had the jury heard the available information regarding petitioner's mental condition); cf. Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006) (reversing PCR judge's conclusion that capital defendant suffered prejudice from trial counsel's failure to offer sufficient social history evidence in the mitigation case where trial counsel interviewed a number of witnesses about defendant's childhood and life; hired a private investigator to gather background information on defendant; called several witnesses, including three experts, to offer mitigating evidence that defendant grew up in a drug environment, had trouble in school, had been abandoned, had a low I.Q., tested "highly abnormal" on the scales of paranoia, schizophrenia, and mania, suffered from chronic depression, ADD, and post-traumatic stress-disorder, and had a history of drug and alcohol abuse); Jones, 332 S.C. at 336-39, 504 S.E.2d at 826-27 (holding capital defendant was not prejudiced by trial counsel's alleged failure to thoroughly investigate and present mitigating evidence regarding his mental impairments where the following evidence was presented in

mitigation: six witnesses, who were familiar with defendant's background, testified regarding defendant's learning difficulties and "unusual behavior;" a clinical psychologist who testified that defendant had "some mental deficiency," was "mentally retarded," had some brain damage, and acted impulsively; concluding that "new" evidence presented at PCR hearing was the same as trial evidence and at best was a "fancier mitigation case").

In sum, we believe there is evidence to support the PCR judge's conclusion that Respondent's trial counsel was ineffective in failing to adequately investigate and present mitigating evidence during the penalty phase of Respondent's trial.[7]

II.

The State argues the PCR judge erred in granting a continuance regarding whether Respondent's trial counsel was ineffective in failing to adequately investigate Respondent's mental competence at the time the crimes were committed. We agree.

The PCR judge found neither Dr. Kuglar nor the court-appointed examiners, who examined Respondent only for competence to stand trial, determined Respondent was mentally ill at the time of the crime. The judge noted, however, that Dr. Kuglar had not been provided with the necessary and relevant background information to make this determination. The judge believed that Dr. Kuglar would have found "plenty of red flags pointing up to a need to test further."

The PCR judge opined "[a]ll of this information raises questions about whether [Respondent] was mentally ill prior to these offenses and what if any impact his

mental illness had on his thinking and behavior at the time of these offenses." The judge believed these questions were not adequately addressed prior to trial because the court-appointed examinations were conducted solely on the issue of competence to stand trial. Furthermore, the judge found that Dr. Schwartz-Watts was unable to adequately examine Respondent with respect to his mental state at the time of the crimes due to his current state of incompetence.

In light of these findings, the PCR judge ruled the issue of whether Respondent's trial counsel was ineffective for failing to adequately investigate Respondent's mental state at the time of the crime was a "fact-based challenge to his defense counsel's conduct at trial that cannot be adequately addressed until [Respondent] regains competence." As a result, the judge granted a continuance staying review of this allegation until Respondent regains competence.[8]

We agree with the State's assertion that the PCR judge's legal conclusions are "flawed." We find the PCR judge analyzed this issue without properly applying the rule adopted by this Court in Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004).

Initially, there appears to be no dispute that Respondent was, and is currently, incompetent. Thus, pursuant to the mandate in Council v. Catoe,[9] the PCR judge should have ruled on the allegation for relief unless Respondent's PCR counsel could establish that this issue constituted a "fact-based challenge" to Respondent's counsel's conduct at trial. If Respondent's incompetency inhibited the PCR challenge, then a continuance would have been proper. We believe

Respondent's assistance was not required and, thus, the PCR allegation was properly before the judge.

In our view, the collateral attack on trial counsel's conduct regarding Respondent's mental state and criminal responsibility at the time of the crime was dependent on Respondent's records as well as the testimony of experts and others who observed Respondent around the time of the crime. Therefore, we do not believe Respondent's assistance or decision making was required. Moreover, all of the evidence needed to rule on this issue was presented at the PCR hearing. Specifically, the PCR judge had before him the trial transcript, the testimony of defense counsel, Dr. Kuglar, Dr. Brawley, and Dr. Schwartz-Watts, as well as Respondent's records. Accordingly, we find the PCR judge erred in granting a continuance.

In light of our holding, the question becomes whether this Court should rule on the merits of the ineffectiveness of counsel issue. Because this Court reviews PCR decisions pursuant to an "any evidence" standard, we find it is procedurally proper to remand this issue for the PCR judge to make a definitive ruling. On remand, the PCR court shall consider the evidentiary record established at the prior PCR hearing in addition to any relevant evidence admitted on remand.

CONCLUSION

Given there is evidence to support the PCR judge's holding that Respondent's trial counsel was ineffective in failing to investigate and present mitigating evidence at the penalty phase of Respondent's trial, we affirm the PCR judge's decision vacating Respondent's

sentence and ordering a new sentencing hearing. We, however, find the PCR judge erred in continuing indefinitely one of the PCR grounds until Respondent regains competence. Because Respondent's assistance is not required for PCR counsel to present the issue regarding whether Respondent's trial counsel was ineffective in failing to adequately investigate Respondent's mental competence at the time the crimes were committed, we reverse the PCR judge's order on this issue and remand for the PCR judge to rule based on the evidentiary record presented at the PCR hearing in addition to any relevant evidence admitted at the hearing on remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MOORE, WALLER and PLEICONES, JJ., concur. TOAL, C.J., dissenting in part in a separate opinion.

CHIEF JUSTICE TOAL: Although I agree that the PCR court erred in granting a continuance as to trial counsel's investigation of Respondent's mental competence at the time the crime was committed, I disagree with the majority regarding trial counsel's performance during the mitigation phase of trial. In my view, even assuming trial counsel was deficient in presenting mitigating evidence, Respondent was not prejudiced. Considering the overwhelming evidence against Respondent, the violent and brutal nature of this crime, and the fact that the jury found the existence of six aggravating factors beyond a reasonable doubt, in my opinion, it is not reasonably

likely that the jury would have returned a different sentence. *See Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (recognizing that the PCR applicant bears the burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional mitigation evidence). Accordingly, I would reverse the PCR court's order finding trial counsel ineffective during the mitigation phase of Respondent's trial.

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[1] Counsel contended the polygraph test was relevant to establish the following two statutory mitigating circumstances: (1) Respondent was an accomplice in the murder committed by another person and his participation was relatively minor; and (2) Respondent acted under duress or under the domination of the other person. S.C. Code Ann. § 16-3-20(C)(b)(4), (5) (1985).

[2] Council v. South Carolina, 528 U.S. 1050 (1999).

[3] Wiggins v. Smith, 539 U.S. 510 (2003).

[4] In Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993), this Court adopted a two-prong analysis to determine a convicted defendant's competency to be executed.

[5] We note that these guidelines were revised in 2003. However, we cite to the 1989 guidelines given they were in effect at the time of Council's trial.

[6] In Council v. Catoe, 359 S.C. 120, 128, 597 S.E.2d 782, 786 (2004), this Court noted the State presented

an overwhelming amount of evidence of Respondent's guilt.

[7] In no way should our decision be construed as minimizing the brutality of the victim's murder. We are, nevertheless, bound by a standard of review which mandates our affirmance of the PCR judge's decision if there is any probative evidence to support it. Moreover, we are cognizant of appellate decisions in this state which determined that counsel's deficient performance in a death penalty case did not warrant reversal where, beyond a reasonable doubt, the error did not contribute to the verdict. See Plath v. Moore, 130 F.3d 595, 601-02 (4th Cir. 1997) (finding trial counsel's alleged failure to present additional mitigating evidence in sentencing phase of capital trial did not warrant habeas relief for petitioner; stating "in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor"); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (finding, in capital case, trial counsel's failure to object to unconstitutional malice charge was harmless where, beyond a reasonable doubt, the error did not contribute to the verdict in light of the overwhelming evidence of malice). We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence for Respondent. Thus, we are unable to find trial counsel's deficient performance constituted harmless error.

[8] The PCR judge inferred that it would be unlikely that Respondent would regain competence. Based on our review of the record and the opinion of Dr. Schwartz-Watts, we agree with the PCR judge's

assessment. Thus, even if Respondent is sentenced to death after a re-sentencing hearing, we believe it is doubtful that he will ever be executed in light of our decision in Singleton.

[9] In Council v. Catoe, this Court stated:

> the default rule is that PCR hearings must proceed even though a petitioner is incompetent. For issues requiring the petitioner's competence to assist his PCR counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the PCR judge may grant a continuance, staying the review of those issues until petitioner regains his competence. All other PCR claims will not be subject to a continuance based on a petitioner's incompetence.

Council v. Catoe, 359 S.C. at 130, 597 S.E.2d at 787.

Appendix C

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas (PCR)
James R. Barber, III, Circuit Court Judge

Opinion No. 26543
(S.C.Sup.Ct. filed September 8, 2008)

Donney S. Council, a/k/a
Donnie S. Council, Respondent,

vs.

State of South Carolina,

Petitioner.

PETITION FOR REHEARING

This Court issued an opinion in the captioned capital post-conviction relief case that affirmed in part, reversed in part, and remanded for the PCR judge to rule on the issue of whether trial counsel was ineffective in failing to adequately investigate Respondent's mental competence at the time the crimes were committed. Pursuant to South Carolina Appellate Court Rules 221 and 224, Petitioner, the State, now seeks rehearing on that portion of the opinion in which

this Court affirmed the PCR judge's finding that trial counsel was ineffective in failing to investigate and present mitigation evidence, and asks the Court to consider the following specific points and errors that may have been misapprehended or overlooked:

The Court Applied A Clearly Erroneous Standard in Evaluation of Prejudice

Harmless error is not applicable to ineffective assistance claims. *Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993). The majority incorrectly made a harmless error analysis:

> In no way should our decision be construed as minimizing the brutality of the victim's murder. We are, nevertheless, bound by a standard of review which mandates our affirmance of the PCR judge's decision if there is any probative evidence to support it. Moreover, we are cognizant of appellate decisions in this state which determined that counsel's deficient performance in a death penalty case did not warrant reversal where, beyond a reasonable doubt, the error did not contribute to the verdict. *See Plath v. Moore,* 130 F.3d 595, 601-02 (4th Cir.1997) (finding trial counsel's alleged failure to present additional mitigating evidence in sentencing phase of capital trial did not warrant habeas relief for petitioner; stating "in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor"); *Arnold v. State/Plath v.*

> *State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (finding, in capital case, trial counsel's failure to object to unconstitutional malice charge was harmless where, beyond a reasonable doubt, the error did not contribute to the verdict in light of the overwhelming evidence of malice). We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence for Respondent. Thus, we are unable to find trial counsel's deficient performance constituted harmless error.

(Opinion, n. 7).

This Court initially identified the correct legal standard under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998), that "prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer- including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" (Opinion, p. 16). In short, it is the applicant's burden to show "that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information" and in light of entirety of the evidence. Id. The analysis veered into "may have influenced the jury's assessment" of culpability, (Opinion, 17), and also noted, in an apparent nod to the atrociousness of the crime, and the six aggravating factors found beyond a reasonable doubt, the "brutality" of the crime, (Opinion, n.7); however, the majority clearly relied on an erroneous

prejudice analysis that shifted and raised the burden of proof: "We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence for Respondent. Thus, we are unable to find trial counsel's deficient performance constituted harmless error." Id. *Strickland* prejudice is based on reasonable probability defined as "a probability sufficient to undermine confidence in the outcome" of the trial, or in this case, the sentence, *Strickland*, 466 U.S. at 694-695, and the burden is on the applicant. *See also Rompilla v. Beard*, 545 U.S. 374, 390 (2005)(applying *Strickland* error and prejudice, noting the burden was on the petitioner to show prejudice); *Wiggins v. Smith,* 539 U.S. 510, 534 and 537 (2003)(petitioner bears burden of showing "there is a *reasonable probability* that at least one juror would have struck a different balance")(emphasis added). Again, a harmless error analysis is not applicable. *See Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993). The State notes that the dissent correctly applied the proper standard and found that, in light of the "overwhelming evidence against Respondent, the violent and brutal nature of this crime, and the fact that the jury found the existence of six aggravating factors beyond a reasonable doubt, in my opinion, it is not reasonably likely that the jury would have returned a different sentence." (Opinion, p. 23)(C.J. Toal, dissent). The dissent is correct.

The majority's erroneous reliance upon an inapplicable standard undermines the validity of the its conclusions. The constitutional standard places the burden upon the defendant, not the State, to prove a reasonable probability that the sentence would be life. The Court's erroneous analysis inverted the burden incorrectly upon the State to disprove the effect beyond a

reasonable doubt. Rehearing must be granted to apply the proper federal constitutional standard under *Stickland*, *Wiggins*, and *Rompilla*.

The Court Erroneously Rested Its Decision on Aspirational Ideals in Finding Error As Opposed to Real Error and Actual Prejudice

The majority opinion holds out as error several conclusions that counsel failed to meet, in a timely manner or a particular fashion, certain aspirational ideals in representation rather than relying on a finding of real error and actual prejudice.

First, the majority finds counsel's performance "unreasonable" in not beginning investigation "once the State served the notice of intent to seek the death penalty, counsel discovered Respondent's DNA was found at the scene of the crime, and" found Petitioner made certain inculpatory statement. (Opinion, p. 12). The timing of the investigation matters not when the investigation was made. Nothing in Sixth Amendment jurisprudence suggests a constitutional guarantee of time management or allows a micro-management dissection of counsel's time record in an effort to prove error.

Second, the majority finds counsel's performance unreasonable for not "further investigating Respondent's background" and presenting evidence of same. Yet, the majority concedes trial counsel had records, retained an investigator, and had multiple interviews with the client's family members. (Opinion, pp. 6-7). Further, and rather curiously, the majority sets out that counsel failed to provide his expert, Dr. Kuglar, with "sufficient records," (Opinion, p. 13), yet there was no evidence that there was any record that would have changed the doctor's opinion on the diagnosis - - the exact opposite fact

pattern in *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004), upon which the majority relies. (See PCR App. p. 5292, lines 2-23; BOP, pp. 41-42). The majority appears to suggest that this is a goal every counsel should set, but the result of this assertion in the instant case is of absolutely no consequence.

Third, the majority apparently found error in counsel's decision to hire a private investigator and also rely on his law partner to collect background information, and asserts that counsel should have hired a "social history investigator" - - suggesting such an investigator is the only qualified investigator for such information. (Opinion, p. 14). This new pronouncement that no one but a "social history investigator" could be "qualified... to evaluate the information to assess Respondent's background" Id, (to "assess" a background is a action that remains undefined), is not only not supported by any prior case law, it is directly contrary to *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006), wherein an investigation by a private investigator was found sufficient. *See also Gudinas v. State*, 816 So.2d 1095, 1108 (Fla. 2002)("the decision to hire a social worker appears to be second-guessing by current counsel, rather than identification of a defect in trial counsel's strategy."). Moreover, this new pronouncement raises concerns of whether and how there could be a claim of ineffective assistance of an expert - - clearly not a constitutional guarantee at this time. In this case, the assertion of a court preferred expert raises more questions rather than having announced an unquestionably positive goal.

Fourth, the majority finds error in failing to look to "family records." (Opinion, p. 14). Though the majority finds it "inexplicable" that counsel would find the record "unimportant because they did not directly involve

Respondent," (Id), the majority actually cites to the very reason that counsel did not deem non-related records important: "evidence about the *defendant's background and character* is relevant...." (Id, *citing Penry v. Lynaugh*, 492 U.S. 302, 319 (1989))(emphasis added). Moreover, the majority concedes that counsel did, in fact, interview family members (multiple times) as did others on the defense team, including (as is also referenced in the opinion), the defense expert, Dr. Kuglar. (Opinion, pp. 6-7). Therefore, counsel (and his defense team) was well aware of the defendant's background and character through these interviews.

Finally, to the extent the opinion may be read as finding the referenced ABA guidelines mandatory in evaluating Sixth Amendment claims of counsel error and prejudice, the majority has misapprehended federal precedent:

> While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as a part of the overall calculus of whether counsel's representation falls below an objective standard of reasonableness; they still serve only as "guides," Strickland, 466 U.S. at 688, 104 S.Ct. 2052, not minimum constitutional standards.

Yarbrough v. Johnson, 520 F.3d 329, 339 (4th Cir. 2008). *See also Rompilla v. Beard*, 545 U.S. 374, 387(2005)("[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.' " *Wiggins v. Smith*, 539

U.S., at 524, 123 S.Ct. 2527 (quoting *Strickland v. Washington*, 466 U.S., at 688, 104 S.Ct. 2052)").

The Court Correctly Considered the Evidence in Comparison with Other Cases

Where Prejudice Was Found But Erroneously Found that Any

Additional Mitigation May Have Affected Sentencing And Prejudice Established

The majority acknowledged that the additional mitigation evidence Council presented to the PCR judge -- even after exhaustive investigation in post-conviction relief, with abundant time, well acknowledged resources, and reference to even the most tangentially related records and the most marginally mitigating circumstances to make a case for error - - simply does not show "the level of 'abuse, neglect, and predator and prey situations found in other cases,'" (Opinion, p. 18); however, the majority nonetheless finds the evidence "may have swayed the jury as in Wiggins." Id. The majority committed no error in comparing the mitigation cases in assessing prejudice; however, the majority erred in abandoning a full assessment of the less than "powerful mitigation" impact in light of the tremendous amount and solid evidence in aggravation:

> When mitigation evidence presents significantly less hardship than that found in Wiggins, Williams and Rompilla, however, it follows that the evidence is significantly less "powerful." The question a reviewing court must answer in determining whether a petitioner was prejudiced by a failure to present such evidence, then, is not

> whether the evidence was as "powerful" as the mitigation evidence in other cases, but rather whether the evidence was "powerful" enough to offset the aggravating evidence and demonstrate a reasonable probability of a different result in the petitioner's case.

Yarbrough v. Johnson, 520 F.3d at 342.

Here, where the evidence supported the finding beyond a reasonable doubt of six circumstances in aggravation, and the weighty evidence of Council's actual participation in the crimes, including evidence of his admitted sexual assault of the victim in the upstairs of the home, had the evidence offered in post-conviction relief been heard, it simply cannot be said that it is reasonably likely that the jury would have returned a different sentence. *Jones, supra. See also Wiggins v. Smith,* 539 U.S. 510, 537 (2003)("Had the jury been able to place petitioner's *excruciating* life history on the mitigating side of the scale, there is a *reasonable probability* that at least one juror would have struck a different balance")(emphasis added).

The Court Erroneously Discounted Counsel Strategy on a Simple Disagreement

with Strategy as Opposed An Unreasonable Strategy

As to counsel's decision to pursue an "accomplice theory," the majority asserts counsel should have realized the theory was not that strong. (Opinion, p. 12). That is a matter of opinion. "There are countless ways to provide effective assistance in any given case." *Strickland,* 466 U.S. at 690. Surely, this Court would agree it is not every capital case that has biological evidence on the scene of the murder that does not match the defendant. Moreover, the majority does not

appear to give consideration of the distinct difference between a residual doubt theory, and an *Tison v. Arizona* based legal bar to imposition of the death penalty. This was not a residual doubt theory. This is a case were the client admitted one part of the crime in another part of the victim's home, a sexual assault in a bedroom that was supported by DNA evidence found in that room that was consistent with the defendant's DNA, and the murder scene, in another part of the home, yielded a DNA sample that was not consistent with the defendant. Under hand of one, hand of all, the defendant could be guilty of the home invasion and all crimes therein, but, to be sentenced to death, the jury must find, in addition, major participation and reckless indifference to human life to impose death on one who did not actually commit the crime. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987). *See also State v. Hughes*, 336 S.C. 585, 596, 521 S.E.2d 500, 506 (1999). The majority appears to totally discount this distinction made and authorized by United States Supreme Court precedent. (See, for example, in finding error and prejudice in investigation and presentation of mitigation evidence, counsel knew or should have known that "mitigation evidence was the only means of influencing the jury to recommend a life sentence" (Opinion, p. 12), and, that, after the guilt phase, "counsel was already aware the jury had rejected the defense theory that Respondent was not the actual perpetrator but was merely present." (Opinion, p. 15). Counsel's strategy to depend almost exclusively on this legal concept, though perhaps bold, was not founded on a dereliction of duty to investigate, or a misunderstanding of the law. He simply chose to focus the jury's attention on this clear legal principle. Further, he selected, from a range of witnesses, (PCR

App. pp. 4453-54), the witness he considered most sympathetic and best choice, the defendant's mother, to place a personal touch on the mitigation case. This strategic choice was not a result of counsel's omission or error, but a well-reasoned strategy chosen by qualified, experienced counsel. Council was not entitled to relief.

Conclusion

The State again asserts that rehearing must be granted in light of the majority's erroneous reliance upon an inapplicable standard. Further, and for all the foregoing reasons, the State respectfully requests that this Court reconsider its opinion in light of the facts of record and controlling case law, and reverse the PCR judge's order finding error and prejudice, and granting a new sentencing proceeding.

Respectfully submitted,

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September 23, 2008.
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(2)

No. 08-1237

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2008

State of South Carolina,

Petitioner,

v.

Donney S. Council,

Respondent.

Brief in Opposition
To Petition for a Writ of Certiorari
to the Supreme Court of South Carolina

CAPITAL CASE

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CAPITAL CASE

Question Presented

Whether the Supreme Court of South Carolina properly applied the standard in *Strickland v. Washington*[1] when it found ineffectiveness of defense counsel in the capital sentencing phase of trial?

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[1]466 U.S. 668 (1984).

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Table of Authorities

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Petitioner, the State of South Carolina (hereafter "the State") has filed a petition for *certiorari* seeking review of the decision of the South Carolina Supreme Court ordering a new capital sentencing hearing for Respondent, Donney S. Council (hereafter "Council"), who has been adjudicated as incompetent, due to schizophrenia, since July 31, 2001. South Carolina Supreme Court Appendix (hereafter "State App.") at 3799-3818; *Council v. Catoe*, 597 S.E.2d 782 (S.C. 2004).

Statement of the Case

The South Carolina Supreme Court affirmed the post-conviction relief (hereafter "PCR") court's ruling that Council was deprived of effective assistance of counsel in the penalty phase of his trial for murder and related crimes.[2] The state court held that the PCR judge "properly found trial counsel's conduct was deficient," and that "Respondent was prejudiced by counsel's deficient performance." App. A at 20; *Council*, 670 S.E.2d at 365. The State claims in its Petition to this Court that the state court employed its own, erroneous standard for judging whether Council was prejudiced by trial counsel's conduct of the defense. In affirming the PCR judge's finding that Council was deprived of his rights under the Sixth Amendment of the United States Constitution, the South Carolina Supreme Court properly utilized the standard enunciated in *Strickland v. Washington*, 466 U.S.668 (1984).

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[2]Council's claim that he was denied the effective assistance of counsel due to counsel's failure to investigate Council's mental state at the time of the crime remains pending, following the state court's reversal of and remand to the PCR court on this claim. Appendix A to the Petition for Writ of Certiorari ("hereinafter App. A) at 24-26; *Council v. State*, 670 S.E.2d 356, 367-368 (S.C. 2008).

Reasons for Denying the Writ

"[T]he *Strickland* test of necessity requires a case-by-case examination of the evidence. *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (quotations omitted). "And, because the *Strickland* standard is a general standard, a state court has . . . latitude to reasonably determine whether a defendant has [or has not] satisfied that standard." *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009).

The State's entire argument for *certiorari* depends on reading the South Carolina Supreme Court's decision as one that "abandoned the *Strickland* standard" in finding ineffective assistance of counsel. Petition at 5. This reading is manifestly wrong.

The South Carolina Supreme Court below held–and so explicitly as to make any other reading a plain distortion of both text and law–that it was applying the standard set forth in *Strickland*, as it has consistently in its opinions between 1985 and the present. *See, e.g., Butler v. State*, 334 S.E.2d 813, 814 (S.C. 1985); *Battle v. State*, ___ S.E.2d ___, 2009 WL 282263, *3 (S.C. Apr. 13, 2009).

The state court's analysis of the ineffective assistance claim began with a proper statement of the applicable standards.

> In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsels performance was deficient; and (2) there is a reasonable probability that, but for counsels errors, the result of the trial would have been different. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). We will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR

> court when it is controlled by an error of law. *Suber v. State,* 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

App. A at 11-12; *Council,* 670 S.E.2d at 361. After finding counsel's conduct to be deficient, the court stated the applicable standard for determining prejudice, as follows:

> "When a defendant challenges a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Jones v. State,* 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (quoting *Strickland v. Washington,* 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). This Court explained, "[t]he bottom line is that we must determine whether or not [Respondent] has met his burden of showing that it is reasonably likely that the jury's death sentence would have been different if counsel had presented additional information about [Respondent's] mental condition. In making this determination, we must consider the totality of the evidence before the jury." *Jones,* 332 S.C. at 333, 504 S.E.2d at 824.

App. A at 20; *Council,* 670 S.E.2d at 365.

A. The state court properly applied the *Strickland* standard.

In holding that "the PCR judge correctly determined that trial counsel was ineffective in failing to adequately investigate and present mitigating evidence," App. A at 12; *Council,* 670 S.E.2d at 361, and that counsel's conduct was prejudicial to Council's Sixth Amendment rights, the court below employed the *Strickland* standard throughout its opinion. "In light of Respondent's burden and this Court's standard of review, we agree with the PCR judge that counsel's deficient performance prejudiced Respondent...." App. A at 21; *Council,* 670 S.E.2d at 365.

In its Petition to this Court, at p. 5, the State complains that the lower court "abandoned the constitutional test [in *Strickland*], and allowed relief in the instant case. The misuse is evident in the plain wording of the erroneous opinion." The Petition then misquotes the opinion, stating: "[t]he analysis veered into '*may have influenced* the jury's assessment.' (Appendix A. p. 21)." Petition at 5 (emphasis in original). The correct quotation is: "[w]e believe, as did the PCR judge, this evidence may well have influenced the jury's assessment of Respondent's culpability." App. A, at 21, *Council*, 670 S.E.2d at 365. By deleting the word "well," the State turns the correct and appropriate statement of the court into a questionable version of the *Strickland* standard. Correctly quoted, however, the court's statement is virtually the same as that of this Court: "[i]t goes without saying that the undiscovered 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Respondent's] culpability.'" App. A at 21, Council, 670 S.E.2d at 365 (quoting *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003)). *See also Williams*, 529 U.S. at 398 ("the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability").[3]

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[3]This "may" or "might" "well have influenced" language has been incorporated, cited, or quoted by numerous federal and state courts in granting relief on ineffective assistance of counsel claims. *See, e.g., Jermyn v. Horn*, 266 F.3d 257, 310 (3rd Cir. 2001); *Van Hook v. Anderson*, 560 F.3d 523, 530 (6th Cir. 2009); *Caro v. Woodford*, 280 F.3d 1247, 1256 (9th Cir. 2002); *Smith v. Mullin*, 379 F.3d 919, 944 (10th Cir. 2004); *Williams v. Allen*, 542 F.3d 1326, 1344 (11th Cir. 2008) (Petition for Writ of Certiorari Filed, 77 U.S.L.W. 3488 (Feb 11, 2009) (No. 08-1032)); *English v. Romanowski*, 589 F. Supp. 2d 893, 903 (continued...)

In addition to misquoting and, thereby, distorting the state court's language to assert application of a "may have influenced" standard, the State also asserts that the state court substituted "harmless error" or "nothing to lose" standards in place of the *Strickland* standard. Again, these assertions are clearly erroneous.

For example, the State relies on language not even included in the lower court's final decision in this case to assert that the state court applied a "harmless error" analysis. Specifically, the State's Petition at 10, refers to a portion of a footnote which the state court *withdrew* from its initial opinion to assert application of a "harmless error" analysis. In addition to the absence of any "harmless error" language in the re-filed opinion, it is patently clear, contrary to the State's argument, that the court did not place a burden on the State to show that counsel's errors and overall deficiency was "harmless." All that the court referred to in footnote 7 is its deferential review of the findings of fact and conclusions of law of the PCR court. *See, e.g., Simpson v. Moore*, 627 S.E.2d 701, 705 (S.C. 2006) ("This Court gives great deference to the PCR court's findings of fact and conclusions of law"). The court made this point when it stated, "[w]e are, nevertheless, bound by a standard of review which mandates our affirmance of the PCR judge's decision if there is any probative evidence to support it." App. A at 29 n.7; App. B at 59 n.7; 670 S.E.2d at 366 n.7.

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[3](...continued)
(E.D. Mich. 2008); *Thomas v. Beard*, 388 F. Supp. 2d 489, 510 (E.D. Pa. 2005); *Pursell v. Horn*, 187 F. Supp. 2d 260, 386 (W.D. Pa. 2002); *King v. Bell*, 392 F. Supp. 2d 964, 990 (M.D. Tenn. 2005); *Sanford v. State*, 25 S.W.3d 414, 420 (Ark. 2000); *In re Lucas*, 94 P.3d 477, 511 (Cal. 2004); *Thompson v. Commonwealth*, 177 S.W.3d 782, 787 (Ky. 2005); *Ex parte Gonzales*, 204 S.W.3d 391, 399 (Tex. Crim. App. 2006).

Although the September 8, 2008 withdrawn opinion, at fn. 7, did refer to "harmless error;" that language was deleted from the re-filed opinion dated December 29, 2008. On the same date, the State's request for rehearing was denied. The denial, coupled with the re-filing, confirms that the court simply recognized that the earlier language was misleading. There was no need for a "reconsideration of the logic and reasoning," as suggested by the State. Finally, the State's reference to a supposed "harmless error" analysis at "App. P. 19" (Petition at 12) is incomprehensible, as that page (App. A, p. 19) contains no such mention. Nor is there any "harmless" analysis anywhere else in the opinion. If the State is referring again to footnote 7, it is totally off-base. Neither case cited there supports the State's position. *Plath v. Moore*, 130 F.3d 595 (4th Cir. 1997) (Ineffective assistance of counsel claims were denied in state and federal court proceedings); *Arnold v. State/Plath v. State*, 420 S.E.2d 834 (S.C. 1992) (No ineffective assistance claim was considered in this opinion involving the constitutional validity of a jury instruction concerning an issue of malice, where the harmless error rule did apply).

Likewise, there is no basis in the state court's opinion for the State's assertion that "[t]he majority applied a 'nothing to lose' standard in evaluation of the claim. (Appendix, p. 20)." Petition at 13. Here, the State seeks to utilize a recent decision of this Court–*Knowles v. Mirzayance*, 129 S. Ct. 1411 (2009)–despite the lack of even a colorable basis for its assertion. The phrase "nothing to lose" appears once in the state court's opinion–in its discussion of factors that may influence penalty phase trial strategy. App. A at 20; *Council*, 670 S.E.2d at 364. The court stated that the

presentation of evidence pertaining to Council's mental condition and difficult childhood and adolescence was not explained by alleged strategy because "it is not inconsistent to present the accomplice theory during the guilt phase but mitigation evidence in the penalty phase." App. A at 20; *Council*, 670 S.E.2d at 364 (citing *Wiggins*, 539 U.S. at 535).[4] Thus, the court stated:

> given the State had already presented damaging evidence, we do not believe Council's character could have been damaged any further by the presentation of additional mitigating evidence. Trial counsel essentially would have had "nothing to lose" and "everything to gain" by presenting this evidence.

App. A at 20; *Council*, 670 S.E.2d at 364-365 (quotation marks in original).[5]

There is no basis in the opinion for the State to argue that the court below utilized a "nothing to lose" standard for deciding whether trial counsel was ineffective because his overall conduct was constitutionally deficient and prejudicial. *See, .e.g., Holland*

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[4]While this Court did not use the phrase "nothing to lose" in finding counsel ineffective in *Wiggins*, the concept of "nothing to lose" was clearly considered by the Court in its reasoning. For example, the Court stated:

> [G]iven the strength of the available evidence, a reasonable attorney may well have chosen to prioritize the mitigation case over the direct responsibility challenge, particularly given that Wiggins' history contained little of the double edge we have found to justify limited investigations in other cases.

539 U.S. at 535.

[5]The phrase "nothing to lose" has been similarly used by numerous other courts in describing counsel's deficient conduct and granting relief on the basis of ineffective assistance of counsel. *See, e.g., Frazier v. Huffman*, 343 F.3d 780, 796, *supplemented on denial of rehearing*, 348 F.3d 174 (6th Cir. 2003); *Douglas v. Woodford*, 316 F.3d 1079, 1091 (9th Cir. 2003); *Esslinger v. Davis*, 44 F.3d 1515, 1530 (11th Cir. 1995); *Schulz v. Marshall*, 528 F. Supp. 2d 77, 96 (E.D.N.Y. 2007); *Peterkin v. Horn*, 176 F. Supp. 2d 342, 379 (E.D. Pa. 2001), *amended on reconsideration*, 179 F. Supp. 2d 518 (E.D. Pa. 2002); *Freeman v. Class*, 911 F. Supp. 402, 407 (D.S.D. 1995), *aff'd*, 95 F.3d 639 (8th Cir. 1996); *Williams v. State*, 987 So. 2d 1, 13 (Fla. 2008); *State v. Kougl*, 97 P.3d 1095, 1099 (Mont. 2004); *Goad v. State*, 938 S.W.2d 363, 371 (Tenn. 1996); *Storr v. State*, 126 S.W.3d 647, 654 (Tex. Ct. App. 2004).

v. Jackson, 542 U.S. 649, 654 (2004) (state court did not misapply *Strickland* standard); *Woodford v. Visciotti*, 537 U.S. 19, 22-24 (2002) (same).

B. In applying the *Strickland* standards, the state court properly found that "there was very strong mitigating evidence"[6] that defense counsel could have–but unreasonably did not–present to the jury, opting instead to present an unreasonable all-or-nothing defense of innocence of murder,[7] resulting in prejudice to Council.

The PCR court found and the South Carolina Supreme Court confirmed that counsel could have presented very strong mitigating evidence which counsel failed to present because he conducted an inadequate investigation and focused on an unreasonable, hopeless theme that Council was innocent of murder. The state court confirmed the PCR court's finding that counsel's investigation was inadequate to develop the wealth of mitigating evidence that was present in Council's background. "[N]ot only did counsel delay in investigating Council's background, he failed to conduct an adequate investigation." App. A at 17; *Council*, 670 S.E.2d at 363. The court faulted counsel for failing to hire a forensic social worker for whom funding was available while employing investigators who were "unqualified" to make assessments of Council's background. *Id.* Counsel hired a former policeman to investigate; he was not involved in interviewing family members or gathering records regarding Council's

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[6]App. A at 21; *Council*, 670 S.E.2d at 365.

[7]Counsel testified at the PCR hearing, "[o]ur focus consistently was that he didn't do it, that Frank Douglas did." State App. at 4465. Douglas was the man whom Council claimed murdered the victim. Two semen stains and one pubic hair found at the victim's home were tested. One semen stain and the mitochondrial DNA evidence from a pubic hair were consistent with Council's DNA but excluded Frank Douglas, and a second semen stain was inconsistent with both Council and Frank Douglas. State App. 1613-14, 1683-84, 1694, 2092-93, 2097, 2242-44, 2273, 4286, 4315. The State carefully avoids pointing out that all three items of DNA evidence excluded Frank Douglas. Petition at 14 and 16.

background. State App. 4357. Counsel's investigator did not list mitigation investigation as an expertise; indeed counsel testified that his investigator "would not have been involved" in obtaining family background information. *Id.* Nor was counsel's wife (and law partner) involved in interviewing people, just in getting records. State App. 4358. Counsel testified, "I didn't see the role of a social historian as a – as rendering an opinion.... I thought that was my job." State App. 4446.

At the PCR hearing, Marjorie Hammock, M.S.W., a licensed forensic social worker, Tora Brawley, Ph.D. (neuropsychologist), and Donna Schwartz-Watts, M.D. (a forensic psychiatrist) testified. There was a great deal of child abuse and neglect in the homes in which Council grew up. State App. 4115-16. Council grew up in an atmosphere where continual violence was the way members of the family solved problems; and chaos, mental illness and low intellectual functioning affected everyone in the family. State App. 4135-38. Council is a "a product of extreme poverty" and a "product of his environment." State App. 4121, 4125. Council's early childhood was "a very chaotic and violent period in his life," a period of "a great deal of abuse of the children and of the mother." State's App. 4101-02. There were many moves of the family (seven in all) due to the violent behavior of Council's father (who, for example, assaulted his wife's brother with a pipe and gun). State App. 4103. The father struck Council's mother while she was pregnant with Council and some of her other pregnancies were stillbirths because of her husband's violence. State App. 4135-36. The violence came from not only the father but from Council's siblings as well. State App. 4136. As Ms. Hammock testified, the impact of all the risk factors "would be more

severe [for Council than for a normal child] because the resources were not there, would not be there to help him . . . to manage the day-to-day." State App. 4124. "As the youngest child, he received probably more intensely the negative influences and there were–there were absolutely at that point no resources for him internally and that's inside the family." *Id.* Council burned himself severely at age 7 when he was trying to cook for himself. As the PCR court noted, Dr. Schwartz-Watts testified that a trauma of this nature could itself cause an anxiety disorder in a child. State App. 4167.

Council's siblings and nephews had been diagnosed with major mental illnesses such as schizophrenia, bipolar, borderline personality disorder and depression. State App. 4123-24, 4129-30, 4139-43. Two children of Council's siblings were removed from the home due to abuse and neglect. There was sexual abuse as well as physical abuse; two of Council's older sisters were convicted of child abuse, and two of the children in the house were diagnosed with gonorrhea, including a six year old girl. State App. 4115-16, 4137.

Records show that between the ages of six and ten, Council injured his head in a fall and he also suffered a striking of his head by a brother. State App. 4132, 4105. Whether due to trauma or mental illness, Council's IQ plummeted from 106 at age 7 to 83 at age 10 and it remained there. State App. 4076-77. This drop in IQ, being in excess of 15 points is considered "significant." State App. 4083. Dr. Brawley opined, "I think it's highly likely that, as I mentioned, there was something psychiatrically going on." State App. 4076. Council was seeing and hearing things and had difficulty

sleeping. State App. 4109. Dr. Ray Vaughters noted that Council, at age 12, evinced "psychotic behavior," State App. 3379, 4107, and had trouble sleeping, hearing things, seeing things in the dark, sleepwalking and having nightmares. State App. 4105-10.

Council was diagnosed with Adjustment Disorder of Adolescence and continued at the Aiken Mental Health Center until February, 1978, when the case was closed because he would not cooperate with counselors. State App. 4109. Council's DJJ and mental health records show that he complained of bizarre dreams about mutilation, where someone was "cutting off his arms;" and the records also show him as "not being present," "not functioning," "spacey," walking around "in a daze," and "volatile." State App. 3242, 3283, 4112, 5512. He experienced "mood swings that range from one end of the spectrum to the other," along with bizarre dreams and fantasies. State App. 4711-12, 4113, 5512.

A court-ordered evaluation and a limited psychological battery of tests done in November, 1992, revealed potential "indications for frontal lobe dysfunction." State App. 4069, 5514. Dr. Brawley stated that frontal lobe dysfunction causes problems with good judgment and behavior. "People with frontal lobe problems are more impulsive. They can't monitor themselves as well. They don't think through the consequences of their actions." State App. 4077. Dr. Brawley believed that there were "potential neuropsychological issues" with Council and "learning disabilities." State App. 4070. Therefore, what was needed, according to Dr. Brawley, was "further testing and further records." State App. 4071. Additional testing was done in 1999, and revealed "more evidence of brain dysfunction, particularly in the frontal lobe." State

App. 4072. Based on the school records, testing, and other history, Dr. Brawley concluded this dysfunction was "in all probability . . . there at the time of the crimes." State App. 4078-79.

Dr. Schwartz-Watts testified that Council's schizophrenia started "probably [in] early adolescence, perhaps even childhood." State App. 4163. Dr. Schwartz-Watts explained why she thought Council was mentally ill since adolescence when other evaluators later found no illness. She pointed out that Drs. Frierson and Kuglar did not have "those records of early reports of those psychotic symptoms. . . . so, first of all, they didn't have access to those earlier records.[8] Secondly, they did not have an awareness of the family history that exists.[9] Thirdly, schizophrenia is a disease . . . . symptoms wax and wane." App. 3244-45, 4171. While Dr. Schwartz-Watts said that Council's present condition makes it impossible for her to determine whether mental illness played a role in the crimes, she could say "with a reasonable degree of medical

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[8]The PCR court found that "[t]he defense expert [Dr. Kuglar] was also clearly focused on the issue of competence since he was not asked to examine the Applicant until shortly before trial [record citation omitted] and he was not provided with any background records other than the reports of the court-appointed examiners and Applicant's records from high school. State App. 5524. The PCR Court did not credit counsel's assertion that he had asked Dr. Kuglar to "focus on any mental health issues that would help us." State App. 4379. The PCR court found the timing of Dr. Kuglar's evaluation of Council–just before the trial began–to be corroborative of the psychiatrist's testimony that he was to look only at Council's "competence and capacity." State App. 5505.

[9]The State's Petition at p. 19 states that "counsel was fully aware of Council's family situation." This is not so. Despite three or four inches of Social Services records concerning Council's family, counsel regarded them as irrelevant. "I thought the information related directly to him was what was important. I did not think about getting social history on siblings...." State App. 4448. "I would not have had anything other than what related to him [Council]." State App. 4369. Indeed, counsel testified that he did not seek or see the relevance of any records pertaining to any other person in Council's family. Of such records, counsel stated, "I would not have viewed those as important." State App. 4378; PCR Order at State App. 5500-02.

certainty" that Council "had a psychiatric diagnosis and he was deemed psychotic at age 10 or 11 . . . . I think it's clear he had an illness before, but for that actual time, that time of that crime, I can't do it. He is too ill to be able to assist me in any way in reconstructing any kind of history." App. 4177, 5525. Dr. Schwartz-Watts found additional indications of Council's mental illness in his bizarre conduct, including his wearing clothes backwards and wearing a hood in hot weather. App. pp. 1811, 1813, 4173-75, 4205, 4213-14. "[I]t can be the actual brain structures involved in schizophrenia that someone who has schizophrenia – their temperature or their ability to feel the temperature is somewhat different. In psychiatry we believe it's because of some of the chemical abnormalities in the brain that you see with schizophrenia but it affects their temperature sensation." App. 4175.

In short, the evidence adduced at the PCR hearing disclosed that Council suffered greatly from a childhood and family life that was deficient and brutal. Council's childhood history is a powerful but missing mitigator, which amply supports the determinations of the PCR court, affirmed by the South Carolina Supreme Court, that Council's counsel's failure to develop this evidence resulted in ineffective assistance of counsel under the Sixth Amendment of the United States Constitution and *Strickland v. Washington.*

Conclusion

The State has shown no reason for this Court to intervene in this case or to further elaborate on the standard set out in *Strickland* and reiterated in *Wiggins, Williams and Rompilla*. The Supreme Court of South Carolina followed this Court's guidelines in affirming the grant of a new sentencing trial for Council and the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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*Counsel of Record

Counsel for Respondent Donney S. Council

May ___, 2009.

No. 08-1237

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2008

State of South Carolina,

Petitioner,

v.

Donney S. Council,

Respondent.

Certificate of Compliance

As required by Supreme Court Rule 33.1(h), I certify that the document contains 4138 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May __, 2009.

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CERTIFICATE OF SERVICE

I certify that I have served upon the attorney for the Petitioner a copy of the Brief in Opposition to the Petition for Writ of Certiorari and a copy of the Motion for Leave to Proceed In Forma Pauperis in this action. Service was made by U.S. mail, first class, postage prepaid, to Melody J. Brown, Esq., Assistant Attorney General of South Carolina, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211.

Executed on May __, 2009.

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Donney S. Council, through the undersigned counsel, asks leave to proceed *in forma pauperis*.

Council was declared indigent prior to his trial in 1996. He has remained indigent and represented by court-appointed counsel since that time. He was previously granted leave to proceed *in forma pauperis* before this Court following affirmance of his convictions and death sentence by the South Carolina Supreme Court. *Council v. South Carolina*, 528 U.S. 1050 (1999). Because appellate counsel believed Council was incompetent, documentation from mental health experts (attached) was submitted to this Court in support of the Motion to Proceed *In Forma Pauperis* in lieu of an affidavit from Council.

In state post-conviction relief (hereafter "PCR") proceedings, without opposition by the State, the PCR judge appointed a Guardian Ad Litem, John F. Hardaway.[10] Council was ultimately determined to be incompetent, due to schizophrenia, on July 31, 2001. South Carolina Supreme Court Appendix (hereafter "State App.") at 3799-3818; Council remains incompetent. *Council v. State*, 670 S.E.2d 356 (S.C. 2008); *Council v. Catoe*, 597 S.E.2d 782 (S.C. 2004).

Because of Council's poverty, he is unable to pay the costs of these proceedings or give security therefor.

Executed on May __, 2009.

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[10]Mr. Hardaway died in January 2009.